carolina planning

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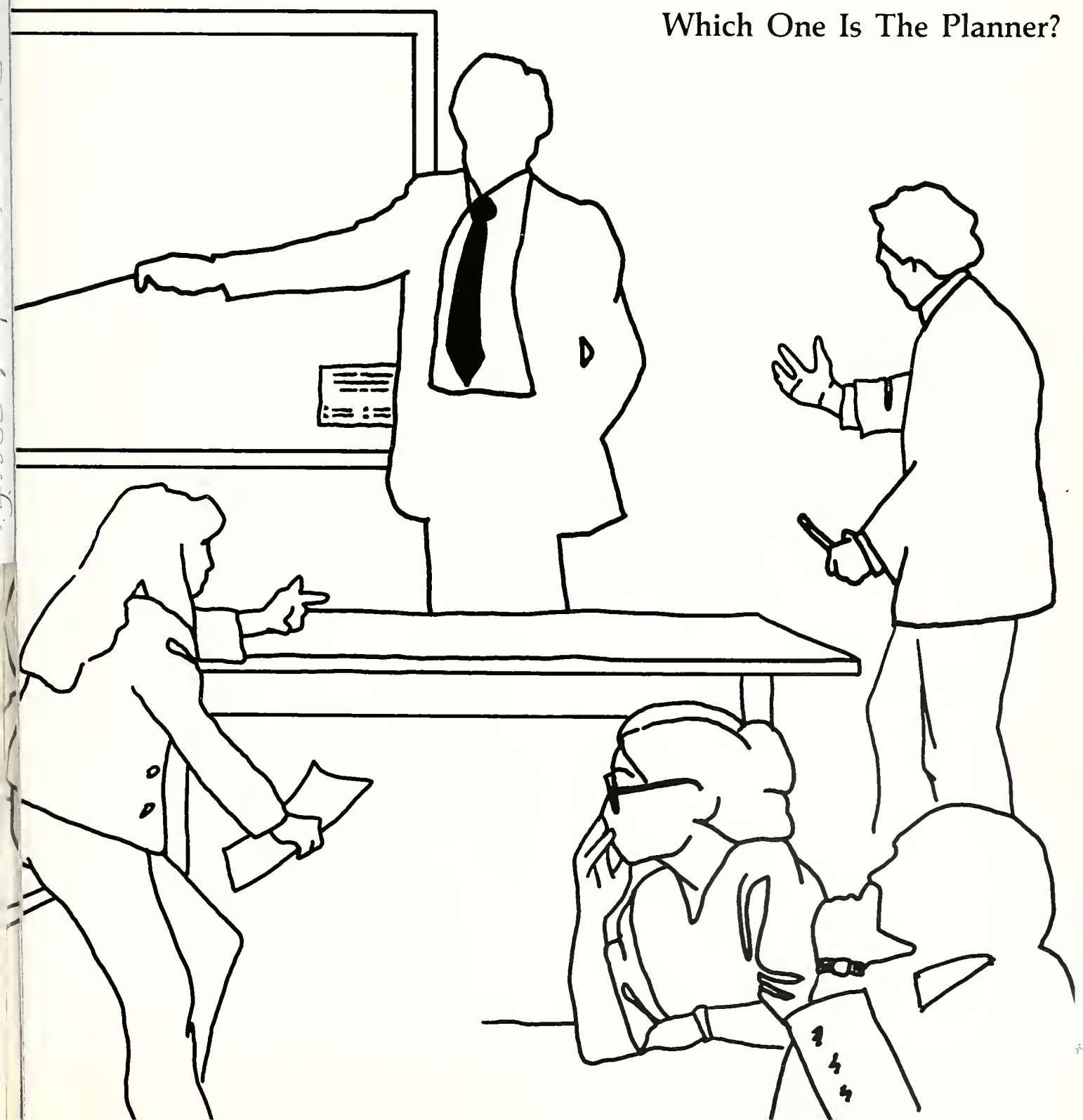
Development Dispute Resolution

Which One Is The Planner?



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Graphic contribution by Marge Victor and Dan Moseley.

editor's note

It is well known by now in the profession that planners are very much involved in what has been coined "development disputes." Although nothing new, the planner's involvement in these common differences of opinion that arise between the parties involved in land development has become a major focus of concern. Despite the efforts so far, however, no one is quite sure what the planner's role *is*, let alone what it should be.

Sorting out the planner's role in development disputes is like trying to solve puzzles. You usually have some frame of reference, like the top of the box that the puzzle comes in. You try to identify the colors and patterns in the disjointed mass of pieces. And then you try fitting them together to form coherent linkages. With much patience and perseverence, a complete picture takes shape.

The only "catch" in solving these particular puzzles is that, like all human interactions, disputes are dynamic. They are three-dimensional puzzles with constantly changing contexts, roles, and linkages.

In this special issue, we present articles that attempt to solve the question of the planner's role in development disputes. The feature articles include a contextual piece on the evolution of the bargaining process in land development; two contrasting case studies of disputes about the siting of low income housing; and a step-by-step guide to recognizing a situation ripe for negotiated settlement. The Forum section offers a closer look at the developer's perspective in disputes, while "In the Works" and "Commentary" address the role of planners in development dispute resolution more specifically.

This special issue, devoted entirely to the topic of development dispute resolution, is one that I am particularly proud to present. My thanks go to David Godschalk and John Forester for their guidance and contributions. Also a special thanks to Marge Victor and Dan Moseley for the excellent graphics, to Roger and his staff at University Printing and Duplicating, and Stacey Ponticello for her constructive comments, hard work, and friendship.

Next year, the magazine will pass into the capable hands of John DiTullio and Russell Berusch. *carolina planning's* reputation as a superior student publication will, no doubt, continue.

Laura D. Bachle
Editor

carolina planning welcomes comments and suggestions on the articles published and will be happy to accept new material for future editions from interested persons. Such material should be submitted to the Editor type-written, double spaced, and not to exceed fifteen pages in length.

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In the Works

Conflict in the Context of Everyday Practice

John Forester

Conflict is a fascinating topic. It is personal, emotional, and an integral part of any job. But public officials, especially planners in the public sector, are party to a unique form of conflict. In the following collection, some of the planner's roles, tactics, and interactions are summarily presented. See if you can find your own approach among these quotes.

Roles

Our role is to listen to the neighbors, to be able to say to the Board, "Ok, this project meets the technical requirements, but there will be impacts..." The relief will usually then be granted, but with conditions...

If I don't think the Planning Board is representing all the problems, then I'll attach a second report for the aldermen...That's not advocacy...That's my job.

I just tell them the rules.

Sometimes I act as someone who lets people talk it out. They're steamed. So I just let them talk.

But I try to keep my opinions out of the public process. I'll say, these are the applicable regulations, here's how the proposal meets or violates them. I'll present the facts and let people respond. I'll show the implications of a proposal, and cite the precedents that apply...But people do ask you all the time, "what do you think? What's your opinion?"

We have access to information, to resources, to skills...so developers usually want to work with us. They have certain problems getting through the process...so we'll go to them and ask, "what do you want?" and we'll start a process of meetings...It's diplomacy; that's the real work. You have to have technical skills – that has to be there – but that's the first 25%. The next 75% is diplomacy, working through the process.

Developers

Early on we can identify constraints, tell them to consider A, B, and C so that the project is ready to be heard at the public hearing. We can help them prepare for the local board: "they really care about *this*, so you better deal with it..."

It's easy to sit down with developers, or their lawyers. They're a known quantity. They want to meet. There's a common language – say, zoning, and they know it, along with the technical issues. And they speak with one voice (although that's not to say that we don't play off the architect and the developer at times – we'll push the developer, for example, and the architect is happy because he agrees with us...)

Take an initial meeting with the developer, the Mayor, and me. Depending on the benefits involved – fiscal or physical – the Mayor might kick me under the table; "not now" he's telling me. He doesn't want to discourage the project...and so I'll be able to work on the problems later...

Time is money for developers. Once the money is in, the clock is ticking. Here we have some influence. We may not be able to stop a project that we have problems with, but we can look at things in more or less detail, and slow them down. Getting back to them can take two days, or two months, but we try to be clear, "we're people you can get along with," and so many developers will say, "let's get along with these people and listen to their concerns..."

John Forester teaches in the Department of City and Regional Planning at Cornell University. This year, he was Visiting Associate Professor at the Department of Urban Studies and Planning at Massachusetts Institute of Technology, and Research Fellow at the Lincoln Institute of Land Policy.

Citizens and Neighbors

But then there is the community. With the neighbors, there's no consistency. One week one group comes in, and the next week it's another. It's hard if there is no consistent view. One group's worried about traffic; the other groups not worried about traffic but about shadows. There isn't one point of view there. They also don't know the process (though there are those cases where there are too many experts!)

We'll ask for as much in the way of conditions as we think necessary for the legitimate protection of the neighborhood. The question is, "is there a legitimate basis for complaint? And it's not just a matter of complaint, but of merits."

Now with the developers we're real up front. We'll say, "this is what we like, what we don't, what you need to change." But it's different with the neighbors. . . the project review process is a real educational process. They have to react unencumbered by anything else than the facts of the case . . . Am I worried about swaying the neighbors? Yes—they're the ones who'll have to live with the building, so I have to let them develop their positions. . .

It's one thing to begin the discussion of a project (to present our analysis) and anticipate the problems. But it's another thing to *rebut* a neighborhood resident in public in a gentle way. . . Part of the problem is that if you antagonize people it'll haunt you in the future. . . We're here for the long haul, and we have to try to maintain our credibility. . .

I can tell the developers that the neighborhood concerns are; I know the neighborhoods, the neighborhood activists. I know what the community wants. . .

Regardless with how our first meeting with a developer goes, we recommend to them that they meet with the neighbors and the neighbors' representatives (on the permit granting board). We usually can give the developer a good inkling about what to expect both professionally and politically. The same elected representatives might say that a project is "OK" professionally, but not "OK" for them in their elected capacity. We try to encourage back and forth meetings. . .

Methods

In the middle you get all the flack. You're the release valve. You're seen as having some power. . . and you do have some. Look, if you have a financial interest in a project, or an emotional one, you want the person in the middle to care about your points of view. . . and if you don't think they do, you'll be angry!

So when planners try to be "professional" by appearing detached, objective, does it get people angry at them?
Sure!!

On another project, we waited before pushing for changes. We wanted to let the developer get fully committed to it; then we'd push. If we'd pushed earlier, he might have walked away. . .

I also make a point to tell each side the other's concerns—categorically, not with names, but all the other sides' concerns. . . Why's that important? I like to let people anticipate the arguments and prepare a defense—either to stand or fall on its own merits. For people to be surprised is unfortunate. It's better to let people know what's coming so they can build a case. They can hear an objection—if you can retain credibility—and absorb it; but in another setting they might not be able to hear it. . . If they hear an objection first as a surprise, you're likely to get blamed for it. If concerns are raised in an emotional setting, people concentrate more on the emotion than on the substance—this is a concern of mine. In emotional settings, lots gets thrown out, and lots is peripheral, but possibly also central later. . .

What we do is *pre-mediate* rather than mediate after the fact. We project people's concerns and then raise them; so we do more before the fact (of explicit conflict). . . the only other way we step in and mediate, later, is when we support changes to be made in a project, changes that consider the neighbor's views, but that's later, after the public hearing. . . □

These quotes are excerpted from a paper entitled Planning in the Face of Conflict: Mediated-Negotiation Strategies in Local Land Use Permitting Process, by John Forester, Ph.D., available through the Lincoln Institute of Land Policy, 1000 Massachusetts Ave., Cambridge, MA 02138.

Forum

Smoothing Out the Approval Process: A Developer's Viewpoint

Stacey A. Ponticello Russell Berusch

W. Whitfield Morrow is a president of Fraser, Morrow, Daniels & Company in Research Triangle Park, North Carolina. This development firm specializes in high quality, large-scale commercial, office, and residential projects. One of the firm's current projects, still in the development stage, is Rosemary Square, which is a public-private venture in Chapel Hill that serves as an important case study on development negotiations in North Carolina.

Mr. Morrow earned his undergraduate degree from Davidson College and his MBA from Harvard University.

CP: Your company's repertoire of development projects, especially in the Southeast, is extensive. Can you begin by providing us with an example of the kind of experiences you've had with the development approval/negotiations process?

Morrow: Early in my career, while involved in the development of Sea Pines Plantation on Hilton Head, our company developed virtually without a public approval process. We did whatever we wanted and imposed our own restrictions on ourselves. Later, I had another set of experiences working for the State of North Carolina, trying to clean up areas that were done without any kind of detailed approval process. So, when you don't have a detailed approval process, you open yourself up to a very wide range of potentially negative effects. On the down side, you can have trailers on the beach spewing sewage, if someone wants to be entirely exploitative. On the upside, though, you could end up with something like Sea Pines Plantation which is much better done than anything that has resulted from a public approval process.

What the public approval process does is narrow the range of possible things that can happen. I think in many cases it eliminates the very best things that can happen, but it also prevents the very worst things from happening. And in many areas which have very tightly controlled approval processes, we are seeing the lowest common denominator of development that is approvable. So we are only getting "approvable" projects, and everything tends to look the same. The streets are all exactly the same width with the same number of trees on each side; you end up with an army barracks kind of development process. But it also eliminates the very intense development problems that you get when some people exploit the lack of control. What developers need to do is make sure that the rules and regulations of the process allow for good things to happen. Rather than fight every kind of control, I think development professionals should be a part of that process of creating the rules and regulations so that you can allow innovative and appropriate approaches.

CP: At what point in the development process do you usually begin talking to planners, board members, citizen groups and the like?

Morrow: As a matter of company policy we go in as soon as we have a piece of land identified and talk with the planners and staff to make sure we have all the rules in place. In many cases we don't get all the information we need, and we have some surprises later on, but we've learned that disclosing as much as possible up front saves headaches later.

The problem we've seen is that the planning staff frequently doesn't have time to deal with a proposed development until you're way into the approval process. We often produce documents, maps, and plans

Russell Berusch is a Master's Candidate in the Department of City and Regional Planning at the University of North Carolina at Chapel Hill.

Stacey A. Ponticello received a Master's Degree from the Department of City and Regional Planning at the University of North Carolina at Chapel Hill in 1986.

and go through a lot of expense before getting meaningful conversation and review from the planning department.

CP: You mentioned that planners' lack of time to review pre-development proposals is a problem. Are there gaps in planners' training that also make dialogue difficult?

Morrow: Until recently, a lot of planning schools have trained planners to primarily focus on the public policy and design kinds of questions. They were trained to believe that the developer was their enemy. They thought their job was to limit growth and to stop developers from messing things up. In order for planners to be truly effective today, however, they should be equipped with training in finance and politics which will enable them to more fully understand matters of concern to developers. So much of what's done today in any growing area is really a public/private venture, and development companies must adhere to the rules prescribed by the town.

CP: What about formalizing the development negotiations process—setting up rules requiring developers and neighborhood groups to enter the process early on in order to avoid conflicts that might emerge later?

Morrow: I think there ought to be a predevelopment conference where the development company works with the planning staff to outline all the major issues that need to be dealt with. If it's a major impact project affecting existing neighborhoods, then those neighborhoods ought to be part of early discussions, because any identifiable problems can usually be cured up front. I think, in the development business, the thing we fear the most is getting six months or twelve months into a process and then having something new introduced that requires going back and changing a lot of things. It's enormously expensive to make changes at that point.

CP: Can you put this idea of a predevelopment conference in the context of Rosemary Square? Was there any attempt to bring together conflicting forces?

Morrow: The Rosemary Square project has gone through hundreds of review sessions—with the planning staff, the town council, the Planning Board, the Historic District Commission, the Appearance Commission and other citizen groups that have had to review the project. In addition to that it went through numerous public meetings. Subsequently, some people expressed their opinions two years into the process. The public participation process, while being very valuable if done in the proper sequence and with proper motivation, can be dangerous if abused.

CP: At what point in the approval process is it optimal to invite citizen participation?

Morrow: I think the critical point for citizen participation begins as early as the comprehensive planning stage, in setting community goals and neighborhood guidelines so that residents have said ahead of time, before any project has been proposed, what they would like the community to look like.

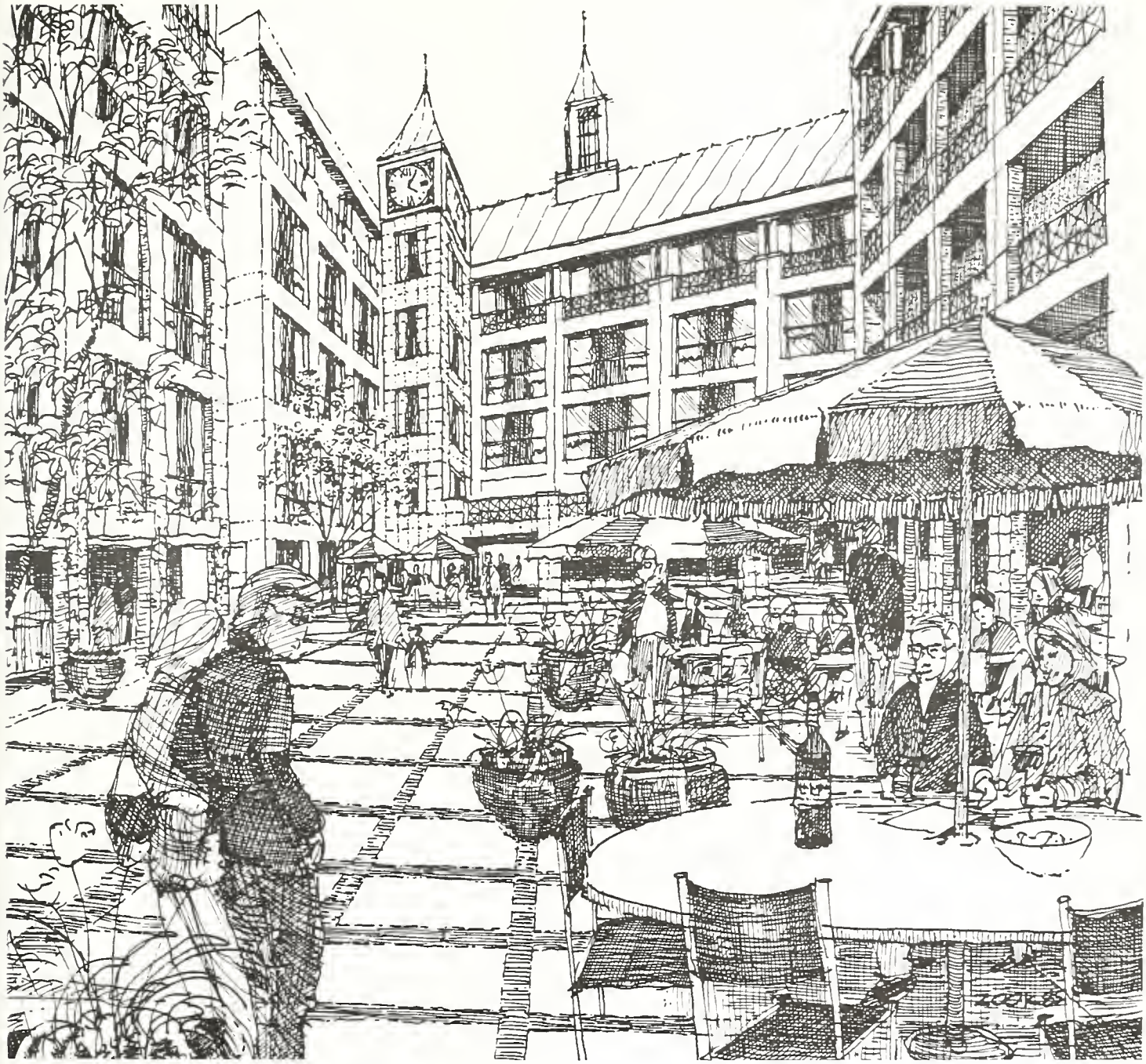
Early in a complex development process, the developer and the staff are learning how to deal with anything that's new or different. I think technical issues need to be generally worked out prior to having detailed public participation. In most communities there's a zoning process that sets the guidelines. And that's where people should participate, whether or not there's a project proposed for the area.

The most difficult thing about citizen participation is that many citizens who choose to participate do so only when they oppose something. They don't do it in a pro-active way. More importantly, the huge majority never expresses an opinion publicly. So, if we set up a very formal process, it may only provide a forum for the people who want to complain. This would not be productive.

As it stands, a lot of people wait until a project is under construction before voicing their opinions. It's unfortunate that you can't identify ahead of time everybody whose got a legitmate interest in a project and can invite them to a review session. Perhaps the planning department should do that. Maybe the planning department should identify any project that's likely to be controversial and get the appropriate people from the community to particiate in the process early or at least give some guidance about what would be acceptable or not acceptable.

CP: In the case of Rosemary Square did you feel that when the going got tough and the citizens became more vocal in their objections, the city didn't do its part in helping to guide you through the approval process? Because the project is a joint venture with the city you may have expected greater assistance in getting through the rough spots.

Morrow: No, I don't think the city abandoned us in any way. The difficult thing in the Rosemary Square process, however, is that it's a very long process. The



Architect's sketch of proposed Rosemary Square development

political players change, opinions change for various reasons, and some people don't feel ethically bound to live up to the commitments made by their predecessors. I think that's wrong. But that's reality.

CP: How would you like to see this remedied?

Morrow: Well, I think the process is healthy in general, except for when it's taken too far. When doing a complex project you expect a detailed review. In the Rosemary Square case I think the project has benefited some by the long review and by some of the subsequent changes that have been made. But I think we're past the point of that being beneficial as we approach final construction approval. After being selected by the council and having the project design and scope approved, we've invested $1.1 million in the project, in good faith, responding to town review requirements.

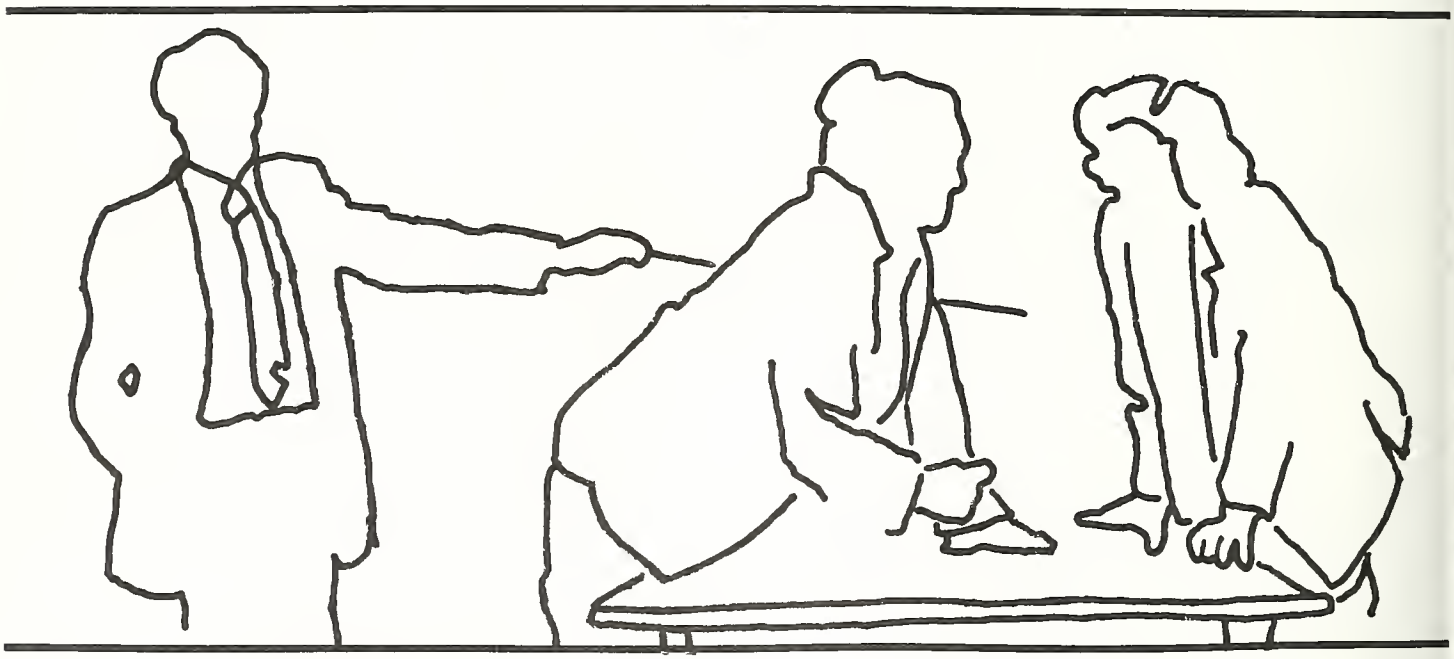
CP: We talked a little bit about the planner as being the best person to be the mediator. Do you ever think it's appropriate for the city to hire a neutral mediator?

Morrow: In the Rosemary Square process, the town has hired numerous consultants to evaluate various parts of the project, but the mediator-interpreter role, by definition, is played by the town council, the town planning board, the appointed commissions and the town staff. That's their job—to perform that function for the town. We have a representative form of government where people are elected or hired to represent the public interest, and to replace that or circumvent that process is a poor use of time and energy, and an abdication of responsibility.

CP: Would your stance change if the town staff's recommendations were biased in order to satisfy politicians' desires, rather than guided by good planning principles?

be in the best interest of the town at all to listen to the squeakiest wheel.

There's a vast silent majority in every town that needs to be represented. A small vocal minority should not run a town. In some cities, it's a development group that's the small vocal minority. In other places, it's a citizen lobby group that only wants trees and parks. Even at Hilton Head, which was done marvelously well, the people that bought houses there and retired there wanted to burn the bridge and keep the next guy out once they got their piece of the island. In Chapel Hill, neighborhood groups, who love their neighborhood, want to prevent any other neighborhoods from being built. It's a continuing process, and as long as there's change there are going to be people



Morrow: I don't know that there needs to be a neutral party. The town council is elected to represent the town in all matters of public interest. And that's what they do. To the degree the decision makers—the council—need information, then citizen groups, advisory boards, the town staff, the development company itself, outside consultants, and others can be called in to provide that information. I think that the town council needs to make decisions, live by those decisions, honor commitments and move forward with things, and not defer complex issues to easily distorted public referendums or to listen only to whomever shows up at a town meeting. It may not

with a vested interest in the community as it is, who will oppose any further change.

CP: In your negotiations with planners, do you observe a rift between planners and developers because planners tend to have a long range view of a community whereas a developer is responding to a market gap?

Morrow: A market gap is something that doesn't exist that people want. The planner's job is to interpret what the people want, just like developers do. And where there are disagreements, that's where the discussion needs to take place. I think its dangerous for both

developers and planners to assume that they have the exact definition of what people *should* want, as opposed to what they *do* want. It's much better to listen to people and see what they want, and then provide it in the most pleasant way.

CP: It seems one solution to a long, drawn out approval process is a tighter zoning ordinance, though on occasion that leads to formula-like development. Perhaps a better solution is to include more flexible zoning devices that invite negotiations. The PUD (Planned Unit Development) comes to mind. What is your opinion?

Morrow: I think the Planned Unit Development process is the most healthy thing we have right now in the development industry. It enables you to have different solutions to problems—different ways to get traffic through, different ways for recreation to be put into a community, different rules for setbacks and so on. I think most of our development ordinances are drawn assuming that everybody is going to build the same product on exactly flat land in exactly the same relationship to other major facilities in town. And it's just not true. We need a lot of flexibility to do things well and create pleasant environments. The very tight development ordinances, designed to avoid ever having a capacity problem—with traffic, for instance—over-design, over-engineer and over-build everything. Many of the streets in this country have been built based on the 1954 turning radius of a hook and ladder fire truck. A cul-de-sac at the end of the street has to have a hook and ladder fire truck turn around at the end of it when, in fact, the houses are only twenty feet tall, and fire trucks can back up. It makes a very unpleasant neighborhood when all of the green space is taken up in asphalt.

I think we need to look at pleasantness issues and spend more time saving trees than we do building overly-wide neighborhood streets, which often result from implementing a rigid uniform zoning ordinance.

CP: Do you think there should be limits on the length of time over which the approval process takes place?

Morrow: I think that it should be reasonable, because very lengthy processes drive up the cost of the product. Except in complex, large proposals, the only reason you have long, drawn out approval processes is because the vision of what the town wants to look like is not clear. If a town can establish very clear guidelines for what is valuable in the community, up front—whether it's trees or rusticness or open space—the process would be greatly improved. In this way, if you bring in a project that accomplishes the general goals and meets minimum safety standards *already* established, we can go from there. That's a much better process than setting maximum standards for everything and not specifying the aesthetic end of what we want.

W. Whitfield Morrow, president of Fraser, Morrow, Daniels & Company

When you have one set of official rules that evolve into a set of economics for a community—a set of land prices and other things—and then those rules are not administered consistently, someone may buy a piece of land for $5 a square foot when it's only worth $3 a square foot after the planning board gets through with it. That's a major problem, and those kind of economic consequences are things that force developers, even well-meaning developers, into law suits. That's where the process really gets bad, when the set of rules for the community are not administered consistently and leave people wide open for major problems. When a group of people can get together and agree on what they want their neighborhood or town to be like, then it's easy to follow those rules. □

The Evolution of Public-Private Bargaining in Urban Development

William Fulton

The urban development process today is typically characterized by intense study and discussion of a project's impact upon various aspects of society. In this article, the author chronicles the rise of the major actors involved in the urban development scene: developers, municipalities, and citizens. The actor's power bases and modes of interaction are sketched to illustrate their effect on the urban development process.

William Fulton is a journalist in California and a contributing editor of *Planning* magazine. He also is a member of the Planning Commission for West Hollywood, CA. Mr. Fulton holds an M.A. in Urban Planning from UCLA.

Introduction

Once merely a matter of getting zone changes and abiding by a few basic rules, governmental approval of development has become a complicated game of bargaining in which cities and neighborhood groups have become "civic entrepreneurs," and developers, as Donald G. Hagman put it shortly before his death, have become "community financiers."[1]

This method of development is radically different from past methods—indeed, the opposite of traditional zoning practice—in that it is often project-specific and less bound by legal constraints than traditional land-use regulation.[2] As a result, the outcomes for both the developer and the community have become less predictable.

This bargaining process has come about as a result of a variety of pressures placed on the land-use regulation system over the past twenty or so years. But all these pressures are traceable to three related developments:

(1) A growing understanding that development has external effects and, largely through the environmental impact process, a growing ability to identify, measure and deal with those effects on a case-by-case basis.

(2) The rise of what might be called "citizen power"—environmental, consumer, and neighborhood groups which have forced the creation of such tools as the environmental impact statement and have subsequently used them to wield great power over development, even when the groups are small and have relatively little money. The undeniable success of citizen power has brought citizen groups to the bargaining table and made developers (and cities) more willing to deal with them.

(3) The growing reluctance of political jurisdictions to shoulder the external costs of private development, leading them to push the burden onto the developer. This practice has been far more common in developing suburban communities than in the older cities, and in California its growth has been greatly hastened along by the passage of Proposition 13.

But how have these three trends converged to create today's atmosphere of bargaining? Would certain basic ground rules or procedures help make the development process more predictable for the developer and still achieve the goals of the communities and citizens groups that engage in bargaining these days? To begin to find the answers to these questions, we must examine how bargaining over land use has evolved in the United States over the past sixty years.

The Inflexibility of Traditional American Zoning

Terms like "bargaining" and "flexibility" have been dirty words since the beginning of land use regulation in America. In fact, zoning was introduced to *reduce* flexibility and protect property owners in high-class commercial areas and affluent neighborhoods from the encroachment of undesirable land

uses.[3] Because the courts concluded that zoning was derived from the police power of the state, it could not be applied arbitrarily, and uniformity in its application—subjecting all property owners in a particular zone to the same standards—was needed to resist legal attacks on grounds that the municipality was arbitrarily contracting away its police power.[4] Good-government reformers also wanted to eliminate flexibility in zoning to discourage corruption—a fear that proved justified over the years.[5]

From the beginning, of course, flexibility did exist in zoning, and was used—often by affluent suburban enclaves to keep out undesirable additions to their communities, and often by corrupt urban politicians to reward their friends and supporters. The variance was suggested by the federal 1923 Standard State Zoning Enabling Act, which intended it to be used in hardship cases. But in practice, according to Richard Babcock, it was used "to grant and deny favors" to particular developers.[6] After World War II, the special permit was added to many zoning systems, and many communities took advantage of this additional discretion by using it to keep out such "undesirable" uses as motels and glue works. This widespread misuse of the special permit prompted one prominent planning lawyer, Walter Blucher, to ask in the '50s whether zoning was "increasingly becoming the rule of man rather than the rule of law."[7]

Despite the successful use of variances and special permits for exclusionary or corrupt purposes, the zoning system remained in principle an inflexible guide to development, designed to encourage good city planning through general land use decisions made in advance and discourage local officials from assessing development projects on a case-by-case basis. According to Professor Jan Z. Krasnowiecki, this method of zoning, which began with the federal enabling legislation of the '20s, left "a legacy of rigidity: a system designed to prevent change rather than to encourage it—a static, end-state concept of land use control."[8]

The Will to Bargain: Citizens

With the exception of the wealthy and powerful residents of exclusive suburban communities and the organized downtown business interests that dominated local politics in most communities, up until the 1960s citizen groups had little direct effect on a community's development decisions. In the '60s, however, the growth of the modern environmental movement helped lay the groundwork for two important developments that led to the bargaining process we see today: the willingness to deal with project-specific effects of development, and the rise of citizen groups powerful enough to take a seat at the bargaining table.

zoning history

"There is a new mood in America," the Rockefeller Brothers Fund Task Force on Land Use and Urban Growth reported in 1973:

> Increasingly, citizens are asking what urban growth will add to the quality of their lives. They are questioning the way relatively unconstrained, piecemeal urbanization is changing their communities and are rebelling against the traditional processes of government and the marketplace which, they believe, have inadequately guided development in the past. They are measuring new development proposals by the extent to which environmental criteria are satisfied—by what new housing or business will generate in terms of additional traffic, pollution of air and water, erosion, and scenic disturbance.[9]

misuse of power

The environmentalists of the late '60s were remarkably successful in a short period of time, perhaps because development of all kinds was coming so quickly. In questioning the true cost of growth for the first time, the new environmental movement was able to force passage of the National Environmental Policy Act of 1969 and, subsequently, similar laws at the state and local levels. "Arming themselves with technical experts, citizens used public hearings, the media, and the courts to exert pressure on government to deny approvals for controversial projects," wrote planning consultant Malcolm Rivkin.[10] Almost overnight, groups of ordinary citizens acquired power to stop developments cold.

true growth costs

Just as important, however, was the fact that the new environmental laws acknowledged that each land-use case is different because each development project's "external effects"—its impact on neighbors and on the municipality in which it is located—are different. The environmental impact statement was the crucial tool in this regard. Unlike zoning, it was not a set of development limitations intended to ensure that all pieces of property dedicated to similar uses were treated the same. Quite the opposite—it was a *procedure*, designed to assure that each piece of land's *differences* were taken into account. The environmental impact process lends itself to discretion and performance standards. The EIS, Malcolm Rivkin wrote,

forces the developer to think through the impact of a project on natural conditions and community patterns, to pay explicit attention to alternative solutions, and to evaluate methods to mitigate adverse consequences. The public can comment—and does. The reviewer, lacking prescribed standards against which to measure much of the information submitted, can exercise considerable discretion reaching final judgments and setting performance standards (e.g., protecting water supply and sensitive land and water features, or preventing a drain on community services). Options and modifications are possible on matters ranging from density to storm-water management. Thus, the EIS can provide a legitimate framework for discussion, for establishing trade-offs and conditions—in short, for negotiation.[11]

acquiring influence

Environmentalists were not the only citizens gaining power in the '60s and early '70s. Poor urban residents, feeling threatened by larger forces in society, flexed their muscles too, gaining power and respect and, hence, a place at the bargaining table.

Perhaps the seminal figure in this drive to organize the urban poor was Saul Alinsky, a blunt-spoken organizer from Chicago who gained wide acclaim for spearheading The Woodlawn Organization's successful stand against the University of Chicago's expansion plans in 1960, and who subsequently trained a whole new generation of organizers through his Industrial Areas Foundation.[12] While Alinsky was showing slum neighborhoods the nuts-and-bolts of how to gain power through confrontation, the federal urban renewal program of the '50s and '60s tore their neighborhoods apart, giving them urgent reason to organize. Later, a wave of federal programs—most notably Community Action and Model Cities—were structured to require more citizen participation, thus encouraging the urban poor to acquire more power.[13]

controlling sprawl

The environmentalists and the urban organizers were part of a larger trend toward the successful use of citizen power against society's large institutions, public and private. Both the environmental movement and the rise of urban activists forced onto the land-use agenda the social and environmental costs of development that zoning has never addressed, and both used conflict and confrontation to acquire enough power to sit at the bargaining table.

The Will to Bargain: Municipalities

While the "country" and the "city" were awakening, the suburbs—where local jurisdictions have traditionally been the most effective controllers of land use—also were coming to see that development exacted a cost traditional zoning did not begin to address. Whereas the EIS addressed the environmental and social costs of new development, suburban communities began to feel the fiscal cost of sprawl.

In the late '60s and early '70s, the suburbs were continuing to grow at an almost frightening pace. In fact, 1973 was the high-water mark in American history for housing starts.[14] Many planners of the time sought to eliminate sprawl through such methods as planned unit and clustered development.[15] In addition, a large number of suburban communities began trying to guide, control, or simply limit growth by setting up growth quotas, rating systems for potential developments, or restrictions on development according to the availability of such public services as water and sewer lines.[16]

Most communities, however, just wanted to make sure the cost of capital improvements made necessary by sprawl got passed on to somebody else—namely, the new residents. Through their subdivision regulations, suburban municipalities began requiring the developer or the new residents to pick up the cost of such necessary improvements as roads, water and sewer lines, drainage ways, and street lights. In some cases developers would be re-

quired to build and dedicate these facilities to the municipality; in other cases, special assessment districts were created to shield other residents from the taxes needed to provide them.[17]

In the '60s, as growth became more rapid, many communities began requiring that new developments set aside land or in lieu fees for parks and schools.[18]

By 1970, this system of capital financing had been refined further, and suburbs had begun requiring "impact" or "development fees." These fees, based on the number of bedrooms or homes in a development, were used not only to provide services directly to the new subdivision, but also to provide for services *outside* the development which needed expansion because of the new residents.[19] Many states passed enabling legislation to authorize local governments to assess such fees.[20]

Impact fees were treated roughly in the courts at first—developers attacked them as being disguised taxes, takings, and unauthorized uses of police power.[21] Although courts still are not entirely in agreement on the matter of impact fees, a growing number of judicial decisions are upholding their validity so long as there is a "rational nexus"—a reasonably close relationship—between the development in question and the use of the fees.[22]

Suburban impact fees and exactions have contributed to an atmosphere conducive to bargaining by suggesting that a developer has an obligation to "internalize the externalities" of his project, and that this sort of internalization can be translated into dollars paid to the city.

In the '70s, dollars became critically important to both suburbs and cities. When the dull and gray municipal bond market was suddenly thrown into convulsions, municipalities had to search for innovative ways to finance capital improvements.[23] In California, a single event—the passage of 1978's Proposition 13, which drastically cut property taxes—had a dramatic effect on cities' attitudes toward new development by simultaneously cutting their main sources of revenue and virtually eliminating the tax benefits of new growth.[24] Thus, many communities began to expand the definition of "rational nexus" in an effort to get as much as they could out of a new development—the only potential source of expanded revenue they could see.[25]

And, by the late '70s, they were willing to bargain to get what they wanted. The federal Urban Development Action Grant cast cities in the role of entrepreneurs by rewarding aggressive municipalities for their attempts to capture private development. As the housing market grew competitive, local governments actually went into the development business to make sure housing was built.[26] Others became brokers who went beyond merely trying to attract growth. They aggressively sought development of the right type and in the right place.[27]

new approaches

Thus, cities were becoming "civic entrepreneurs"—dealmakers accustomed to sitting down at the table with private businessmen and hammering things out.

The Will to Bargain: Developers

Once citizen groups and communities saw the economic, social, and fiscal costs of growth and began trying to deal with it, the cost of development skyrocketed—in terms of both time and money.

Impact fees had reached the point at which, at least according to Hagman, they almost constituted a buy-in fee.[28] The environmental impact process was costing developers time and money even when it went smoothly. It gave citizen groups the power to challenge a project in court, sometimes on technicalities—a process which was bound to cost the developer far more time and far more money even if the challenge had no merit at all.

cost to developers

Furthermore, the passage of environmental laws created a host of government agencies, such as the federal Environmental Protection Agency and its state counterparts, with single-issue agendas. To developers used to working out a mutually acceptable project with a local general-purpose government, dealing with these agencies was a rude shock.

Nowhere did developers find a more frustrating series of events than in California, where growth had traditionally been encouraged. One environmental agency, the California Coastal Commission, had remarkable discretionary authority, and used it to force developers to deal with the external effects of development by mitigating or paying for them. The coastal commission, brought into being through a ballot initiative, sometimes required residential builders to include low-income housing in their beachfront developments; forced almost all landowners to provide public access to the coast in exchange for the smallest permit approvals; and in one case even required a shopping center developer to implement a series of transit improvements.[29]

environmental awareness

Furthermore, some prominent California developers who tried to assert a vested rights claim over

the coastal legislation "suffered a series of crushing rejections" from the courts.[30]

And after a time in California, as the cost of housing became the dominant local issue in the late '70s, even "general purpose" local governments began adopting the Coastal Commission's "inclusionary housing" demands, with varying degrees of success.[31]

use of the courts

Facing a high-cost environmental impact process, citizen groups that could tie their projects up in court indefinitely, hostile single-purpose agencies, and once-friendly local governments trying to extract as much from them as possible, developers were more than willing to bargain for development approvals just to keep their projects going forward.

Bargaining Begins: Environmental Disputes

Bargaining came first to environmental disputes. These disputes usually involved large projects such as power plants or oil refineries, and federal and state laws had given environmental groups tremendous power to impede or stop them. In addition, because of the project-specific nature of the legal process, environmental disputes lent themselves more easily to bargaining than land-use disputes did, and some industrial and utility executives seemed more willing to sit at the table, at least at first, than real estate developers.

In some cases, governmental bodies—mostly beyond the local level—tried to head off confrontation by creating a process that would bring developers in and talk about the chances of their project in advance. As early as 1973, New Jersey environmental officials set up the "preapplication conference" procedure, encouraging coastal developers to discuss their project's chances with regulators even before they apply for a permit.[32]

In many instances, however, the parties to an environmental dispute tried to set up a mediation process, often modeled after mediation in labor disputes. These environmental mediations met with varying degrees of success.

modeled on labor disputes

In New York, for example, the longstanding conflicts over a number of projects on the Hudson River were brought together and successfully mediated by former EPA Administrator Russell Train—but Train bowed out immediately after mediation, and the agreement was difficult to implement without him. In Maine, a dispute over a small-scale hydroelectric plant was resolved when the parties agreed to minimum and maximum lake levels, conditions that were incorporated into the plant's federal license. An argument over how to extend Interstate 90 across a lake into Seattle was extensively mediated, but environmentalists were dissatisfied with the outcome and subsequently sued.[33]

Mediation in this context turned out to be far more difficult than mediation in labor disputes, which involve only two parties and limited issues.[34] And environmental mediation is not necessarily a way to circumvent legal action. Because any party may still file a lawsuit after the mediation, chances for success are usually highest when then parties' legal options have already been played out.[35]

Nonetheless, mediation in environmental disputes did prove that multi-party negotiation over land use and development was possible and sometimes successful, and several groups sprang up that specialized in mediating environmental issues.

Bargaining Goes Urban

In the cities, however, bargaining to resolve development disputes met with more resistance. Though negotiation and bargaining over urban land uses is common in some other countries such as Japan (where a developer might show up at a neighbor's door with a gift),[36] in the U.S. there were considerable legal impediments to it, springing from the rigid land use laws developed earlier in this century. Nonetheless, beginning in the '70s, bargaining came to urban areas—often in deals directly between citizens and developers (with the municipality only peripherally involved) and often with an environmental basis.

An early example of successful development bargaining in a built-up area came in the case of the White Flint Mall near Washington, D.C. Previous attempts to build a shopping center in the area had been fruitless, and a zone change was required. The developer hired planning consultant Malcolm Rivkin to negotiate with the neighborhood group and try to work out "a development scheme acceptable to the residents yet economically feasible for the proponents."[37] Working together, the two sides drew up a special agreement, enforceable in court, that specified a number of details including a guarantee by the developer of an appraised market value on each home in the neighborhood.[38]

Soon enough, however, the Alinsky-style neighborhood activists—who did not necessarily think in environmental terms—saw that they too could bargain with developers and get something out of it.

In San Francisco, where housing is in short supply

but the office market has been booming, housing activists persuaded the city to adopt an informal city policy requiring office developers to provide or pay for housing.[39]

In that same city, as federal housing subsidy funds dried up in 1981, poverty workers in the low-income Tenderloin district managed to strike a deal with high-rise hotel developers to subsidize low-cost single resident occupancy hotels; in this case, however, the city's UDAG was used as the carrot.[40] Generally, developers grumbled but were willing to do it to take advantage of hot markets.

More formal bargaining procedures in urban situations were hampered somewhat by the inflexibility of land-use laws. A deal struck between a developer and neighborhood residents was more or less private, of course, but any sort of official deal with the city always opened up the question of contract zoning and even the still-unsettled legal question of impact fees.

such devices as inclusionary housing, redevelopment areas, and density bonuses.[42] One such authorization was California's development agreement legislation. This law, authorizing local governments and developers to enter into binding agreements on the conditions of development, grew, ironically, out of the California Coastal Commission's refusal to grant vested rights to a large developer which had expended some $3 million on site grading but had not obtained a building permit when the coastal initiative passed in 1972. Development agreements, strongly supported in the state Legislature by the development lobby, were intended to protect the vested rights of developers against future changes in land-use laws.[43]

effect of land use laws

Development agreements, which are enacted into ordinance by local governments, have not been widely used in California. But in Santa Monica a liberal city government used the development agreement process to require developers with fairly good,

In time, however, states began to allow more bargaining. Early in the '70s, Virginia, though traditionally hostile to land-use reform, passed a law allowing contract zoning and fast-growing Fairfax County, near Washington, D.C., used the law to make considerable demands on developers in exchange for permission to develop. By 1978, the General Assembly had amended Virginia's zoning law to allow for conditional zoning statewide. The "proffer" system, as it is now called, has become a routinized form of the zoning approval process in the state.[41]

In California, a number of state laws authorized local governments to bargain with developers, using

but by no means airtight, vested rights claims to make concessions to the city in exchange for permission to build in the face of a moratorium.

Beyond Bargaining

Bargaining, while providing flexibility that a rigid set of land-use rules cannot, is still a process rife with problems. Legal problems still exist. Negotiations among many parties – some unrepresented or even unborn – are complicated. And bargaining takes time. In Santa Monica, for example, the development agreement process became so time consuming that city officials discouraged developers from applying for them.[44]

time-consuming process

Because, in many instances, city, developer, and citizen group have come to be recognized as equals in the development process, there have been attempts to move beyond bargaining and back to rigid programs—only with vastly different ground rules.

ad hoc bargaining

Some cities have used the ad hoc bargaining process as a springboard to programmatic change. In San Francisco, the office-housing connection was passed into ordinance by the San Francisco Board of Supervisors. Under the program, downtown office developers pay $13.34 per square foot in fees for housing, transit, day care, and the arts.[45] In 1983, Boston adopted a "linkage" program, similar to San Francisco's office-housing program, that required downtown office developers to pay $5 per square foot over a 12-year period into a housing trust fund.[46]

Even Santa Monica adopted firm rules. After three years of negotiating with developers, the city council adopted a General Plan in 1984 requiring office developers to build housing and parks or pay an in-lieu fee of $2.25 per square foot for the first 15,000 square feet and $5 per square foot thereafter.[47]

performance zoning

And other cities have tried innovative land-use programs that try to get away from zoning. Ft. Collins, Colo., for example, uses a kind of "performance zoning" that does away with site-specific zoning, and, in addition, the city agreed with the local builders association on a set of mutually agreeable development fees.[48]

Such programmatic attempts, however, once again raise the question of rigidity. Will they be flexible enough to accommodate the differences in each piece of land, each development deal? Will they return us to an era of zoning-type inflexibility? Or, if they are general guidelines rather than specific "end state" plans, will they merely lead to more negotiation?

But there is a deeper question about negotiated development—one involving fairness. Take, for example, our attempts to "internalize the externalities," which lie at the heart of many of these negotiations. Are our methods good enough so that we can identify what all the externalities are and who they affect? Or will the only externalities identified be those affecting organized interests participating in the discussion?

a government of deals

Perhaps that is the most troubling question. Does negotiated development connote the very problem Walter Blucher warned us against thirty years ago—a government of deals, not laws? The outcome of negotiated development depends almost entirely on who the negotiators are. If one neighborhood is organized and another, also affected by the development, is not, it is likely that the second neighborhood will be left out of the final deal.

How, then, can we maintain the useful flexibility of bargaining in land use and development without degenerating into a free-for-all without rules? As experiments with bargaining—and with more flexible land-use programs—continue, that is the question we must seek to answer.□

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Painful Lessons From Piney Mountain: A Framework For Development Dispute Resolution

Jim Holway & John Hodges-Copple

Can the problems and positions encountered in certain development disputes effectively prevent any meaningful negotiation? Are there situations where a win-win outcome is not achieveable? The analysis presented in this case study suggests approaches that can be utilized by municipalities to avoid no-win situations.

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Introduction

The siting of locally unwanted land uses, termed "LULU's," exposes shortcomings in the traditional limited-participation development review process. Decision making with respect to LULU's is complicated because benefits typically are dispersed widely within a community while costs are borne by a minority concentrated near the offending project. The typical decide-announce-defend process—where a developer unilaterally decides to undertake a project, announces project details in an application for approval, then defends the project against opponents in a public hearing—may result in less than optimal outcomes.[1]

This conflict-ridden process becomes a win-lose confrontation for both proponents and opponents. Project approval or disapproval may ultimately hinge on political clout, economic staying power of the participants or judicially decided procedural issues unrelated to the merits of the project. If project approval is secured, as in the case described here, opponents may find little mitigation to show for their efforts and expense, while proponents obtain approval only after an expensive, time-consuming process. With any outcome, uncertainty, expense and delay are likely. Ill will is often engendered among participants, who may find themselves involved in future disputes because of past antagonism.

This article addresses conflict surrounding the development of a public housing project in Chapel Hill, NC. The project and the traditional development review process it underwent are summarized. The process and outcome are critiqued according to the tenets of "principled negotiation."[2] Barriers to and opportunities for a negotiated settlement are outlined. A framework for an amended development review process to include opportunities for dispute resolution and enhanced public participation is proposed.

The Piney Mountain Project

In March, 1986, residents began moving into 16 duplexes (32 units) of public housing on a 5.5 acre site on Piney Mountain Road, seven years after the Chapel Hill Housing Authority was first notified of the availability of funds and six years after the first site selection process began. In the interim, the Housing Authority survived challenges to the project in the development review process, allegations of illegal deal-making, allegations of conflict of interest on the part of the mayor, a court case and an attempt by neighborhood residents to purchase the site. Neighborhood residents were subjected to post-decision disclosure of plans and meager attempts at public participation on the part of the Authority which left a legacy of distrust and anger toward Town decision makers.

The project began with notification to the Housing Authority from the Department of Housing and Urban Development (HUD) of the availability of federal funds in March, 1979. Like many mission agencies, the Authority tended to define its objectives narrowly: provide housing for some of the 380 families on its waiting list, take advantage of what the Authority perceived as the last opportunity for federal funds, and follow a "scattered sites" policy—avoiding concentrations of public housing.

After receiving HUD funding approval in July, 1979, a site selection committee composed of Authority board members and the Town mayor was formed. The committee conducted a site search through local realtors in February, 1980, one month after the Town of Chapel Hill annexed the Piney Mountain Road area. The committee encountered difficulty finding suitably sized sites that met its cost and location criteria.

Acquisition discussions with the owner of the Piney Mountain Road site began in February, 1980. It was only after the Housing Authority was well on its way to receiving purchase price and site approval from HUD that neighborhood residents first learned of the project—by questioning surveyors working at the site. Aside from a design presentation late in the process and apparently some unsuccessful attempts to meet with neighbors following submittal of the development application to the Town, the Authority did not have discussions with neighbors or other interested parties.

Some area residents formed the Piney Mountain Neighborhood Association in opposition to the proposed multi-family project locating in their single-family area. The interests of the Association were divided, with one estimate that approximately 50 percent opposed any public housing in the area, 40 percent opposed the highly visible site chosen and 10 percent opposed the design. Neighbors favoring the project may not have joined the Association.

The Association first tried unsuccessfully to purchase the site, then failed in an effort to defeat provisions of a new development ordinance (adopted by the Town in May, 1981) which allowed higher densities throughout the Town—and would permit the project in their neighborhood. Association members and their attorney petitioned the Town and HUD, expressing opposition to the project and questioning whether Housing Authority and Town decision criteria were being followed. While the Authority's application was winding its way through the Town approval process, the Association alleged a deal had been made to provide public housing for a relative of the site's owner and charged the mayor, an architect, with a conflict of interest.

Piney Mountain

site selection

The Authority's application underwent the Town's standard development review procedure involving Planning Department analysis and recommendation (for the project), Planning Board recommendation (against the project), public hearing, Council vote (7-2 for the project in September, 1981) and review by the Appearance Commission. Because the type of development proposed required a special permit under the 1981 Development Ordinance, the Planning Board and subsequently the Town Council were required to make four affirmative findings in order to approve the project. These were: (1) the project was located and designed so as to enhance general safety and public welfare, (2) the project complied with all regulations and standards, (3) the project was located, designed and operated so as to enhance the value of contiguous properties and (4) the project conformed to the Town's General Plan.

neighborhood notification

The Association advocated denial on the grounds of traffic congestion, negative impact on property values and an excessive concentration of public housing in their neighborhood. The Planning Board's recommendation against approval was based on the first and fourth findings above; it concluded that the site was not the most appropriate

and that some goals of the General Plan were in conflict.

Following Council approval, the Association sued; the decision in favor of the project was announced in February, 1982.

Principled Negotiation and the Siting Problem

process failure

Roger Fisher and William Ury describe in their book *Getting to Yes*, a four part method they term "principled negotiation." Essentially, principled negotiation involves:

(1) separating people from the problem – not letting personalities and egos overshadow the problem to be solved,
(2) focusing on interests, not positions – looking beyond the stated positions to their underlying interests,
(3) insisting on using objective criteria – having participants agree on standards by which decisions will be made,
(4) inventing options for mutual gain – generating several possible packages of options before making a decision.

participant types

A review of the Piney Mountain dispute reveals that the three main parties – the Housing Authority, the Neighborhood Association and the Town – violated the four tenets of principled negotiation.

Discussions with participants revealed that proponents tended to regard project opponents as elitist and perhaps racist, opposing the project out of selfishness and ignorance. Project opponents tended to regard proponents as arrogant and self-righteous, unilaterally forcing unwanted development in their neighborhood and unconcerned as to its impacts. Observers on both sides noted that some proponents and opponents adopted abrasive, confrontational approaches, further polarizing the conflict. With these strongly held images of the people involved, neither side ascribed much validity to the other's stated concerns.

situation analysis

The Authority's strategy of selecting a site and a development plan, then defending its position, and the Association's strategy of attacking the site and plan, precluded the parties from focusing on the underlying interests – the Authority's desire to provide low-income housing and the Association's desire to minimize adverse change to the neighborhood.

The one instance where the dispute came closest to principled negotiation – the use of objective criteria for granting a special permit – failed due to a lack of definition and a lack of options. The Authority's scattered site policy, legitimized in the Town's Housing Assistance Plan, specified acceptable concentrations of public housing in each of the Town's Planning Areas. Disagreement as to whether the large Planning Areas were the suitable level of analysis and whether exsiting or estimated future population should serve as the basis for comparison were never satisfactorily resolved. In essence, the parties tried to bend the criteria to support their arguments for or against the only option under consideration, rather than using criteria to generate options.

The decide-announce-defend strategy precluded the generation of alternatives; the funds were available, the site approved by HUD and the design well under way. Without a political or judicial defeat there would be no fundamental changes in the Authority's plan.

Larry Susskind[3] identified four types of participants in a siting decision. "Boosters" will favor the project and "preservationists" will oppose it without regard to specifics of the proposal or the approval process. "Non-participants" will not get involved. A significant portion of local residents (up to 50 percent) will be "guardians;" their support for or opposition to a project may depend on their perception of the fairness of the decision-making process. Public agencies need to be careful to maintain their support. An enhanced public participation or negotiation framework may be an appropriate vehicle to garner the support of both local government officials and citizen "guardians."

Raiffa[4] and Sullivan[5] discuss factors that tend to help or hinder the use of negotiation in a given dispute. It is critical to analyze each situation to estimate the effectiveness of using a negotiation framework. Several factors indicate negotiation may have been productive in the Piney Mountain case.

First, each party could receive gains from negotiations without sacrificing its best alternative to a negotiated agreement (BATNA): pursuing its interests through the traditional development review process. Because plan review through a public hearing mechanism would occur anyway, none of the parties must abandon strategies they would otherwise use. In addition, willingness to negotiate would signal to decision-makers that a party was pursuing constructive means in the dispute. The review process provides two other incentives to bargaining: it imposes a deadline and it ensures that none of the parties can act unilaterally to attain its goals. A noted exception would be if one party were certain that

the Town's interests were identical to its own, thus ensuring its desired outcome in the absense of negotiation. Some might argue this was true for the Authority in this case, but it is a risky assumption to make in the political arena.

Public and quasi-public projects often lend themselves to bargaining. Because they are designed to fulfill public interests and usually involve the expenditure of public funds, the property rights of the "developer" are often regarded as weaker than in a private development.

Another factor favoring negotiation is the existence of common areas of interest that are not of a zero-sum nature. Early input into which objective criteria should be used to evaluate alternatives and how much weight various criteria should be assigned are examples of expanded participation that need not involve a relinquishment of power. Another example is joint involvement in the design process, where neighborhood concerns might also benefit future project residents. Design elements may be of secondary concern to the Authority as long as cost and scale impacts are minimal.

Given the animosity displayed during the dispute, formal negotiations may have improved basic communication among participants and helped develop less biased analysis of technical considerations. Neutral observers would likely conclude that all parties had legitimate interests and acted in an expected manner to further those interests. In particular, planners need to acknowledge that the "not in my back yard" (NIMBY) response is a rational and legitimate expression of residents' interests.

Finally, negotiations could preclude conflict related to lack of involvement, therby shifting the focus to the merits of the plan.

There are some factors that might tend to hinder negotiations. Foremost among these involves final site selection. Regardless of the process or the design, the neighborhood in which the project is sited is likely to resist. This results in the "reservation price" of the neighborhood (no project at the site) and that of the Authority (some project at the site) being mutually exclusive. This single issue agenda would not be conducive to negotiation since one party must prevail at the other's expense.

In the Piney Mountain case, expense and delay considerations may not have played as large a role as they might in a dispute over a for-profit development. Carrying costs and the need to satisfy investors can be a strong incentive to bargain.

There are also "structural" impediments to negotiation. Among these are: (1) deeply held beliefs which can preclude productive discussion, (2) the inability of an interest group to reach consensus or represent all its member's interests, (3) the unliklihood of future negotiations on a similar project and (4) fear that bargaining may imply legitimacy of others' interests, lessening the probability of a "victory ."

interest expression

It is also important to recognize that any new approach to established procedures may be opposed, largely out of apprehension to forsake something familar for something unknown, with perhaps unforeseen consequences. New approaches also tend to invite legal challenge until they become established. In addition, constitutional or other legal restrictions may affect the ability to employ negotiation strategies in some states.

Enhanced Participation/Negotiation Process

What we term an enhanced participation/negotiation process must consider several elements: what interests are represented, who represents them, at what point(s) in the process negotiation occurs, what is and is not negotiable; and what role(s) the planner may assume in the bargaining process.

impediments to negotiation

Four broad classes of interests could be represented in a typical local development dispute: the project applicant, the affected neighborhoods, the local government and other public service providers, and the direct beneficiaries of the project. State and federal agencies, among others, may also have interests, but for simplicity they are not addressed in this analysis.

How interests are represented is more problematic. The applicant and the local government tend to have adequate means to coherently express their interests, but ad hoc neighborhood groups raise questions of adequate representation. Whether such groups will form and to what degree they represent the neighborhood is uncertain. Negotiations may be assisted by providing a mechanism for neighborhood representation recognized by all participants. A similar problem arises with regard to project beneficiaries. In cases where beneficiaries are identifiable, such as where a waiting list for public housing exists, representatives should be included, perhaps using a mechanism similar to that for the neighborhoods.

bargaining positions

The local government's role needs to be carefully circumscribed. Because the town council will assume

A treeless cul de sac

criteria selection

a quasi-judicial role in the development review process, constitutional considerations suggest that the council not become involved in negotiations.

A negotiation framework would appear to offer several roles for planners, however. Planners may represent town interests as reflected in plans and policies, with the understanding that the planner can suggest likely concerns, but cannot assure approval or denial of any proposal. In this role, the planner becomes one of the parties to negotiate along with the applicant and neighborhood groups. Other duties of a planner in this role include serving as a liaison to neighborhood groups, either as an information broker—ensuring that all interested groups are kept appraised of project developments—or as a technical assistant or advocate for a certain group or groups; preparing estimates of a project proposal's impacts, suggesting mitigation measures that balance various parties' interests and responding to comments on the project submitted by the public. A planner may also serve as a mediator, helping parties to define objective criteria and identify possible mitigation measures. As a mediator, the planner may enhance prospects for principled negotiations as parties may not wish to appear uncooperative before someone with access to decision-makers. For example, the planner may suggest side payments or mitigation measures under town purview that could further prospects for agreement.

negotiation steps

Many of these roles would need to be assumed by different members of the staff as they contain conflicts of interest. If parties to a negotiation are not confident that different members of the same staff can serve possibly conflicting roles, an outside mediator may be required.[6]

Perhaps the most difficult consideration is the point at which various participants should engage in negotiation. Based on the case study, it appears that bargaining needs to occur between different participants at different times. This results in inherent dangers that negotiations will fail since some critical issues would be largely non-negotiable. The incentive for the project applicant to bargain would be too small, and the incentive for project opponents to use unprincipled tactics too great, for the final selection of the preferred site to be negotiable. This conclusion is based on the earlier assessment that site selection constitutes a zero-sum issue which will result in opposition independent of the criteria employed to select the site. Negotiations can help determine what criteria should be used, appropriate mitigation for adverse impacts and site design-

related details once a site is chosen, but not the actual choice of the site.

A three step "negotiation on a higher plane" is envisioned: negotiation to determine objective criteria and how they will be used, site selection without negotiation, and negotiation over mitigation measures and site design elements. Implementation recommendations include both steps to encourage bargaining and changes to the development review process to better embrace a negotiation framework. The recommendations are designed to implement the three-part "negotiations on a higher plane" described above. Recommendations include:

1. *Inclusion of an "Interests of Particular Concern" section in the General Plan.* This section lists types of projects in which the town perceives an overriding public interest. Each locality generates its own list, based on its needs, and may periodically amend it as needed. Types of projects listed might include shelters, utilities, halfway houses, public housing and major public facilities such as hospitals, airports and waste disposal facilities, among others. The listing does not supercede the normal review process. It signals to all parties that minor to moderate impacts of a project may not necessarily be sufficient to deny approval, but must be balanced against the value of the project to the public welfare. This mechanism enhances the legitimacy of proponents for listed projects and opponents for unlisted projects. It clarifies the public interest prior to any specific development proposals and may forestall accusations of due process abuse (such a provision would need to be carefully crafted to avoid a due process challenge out of hand). If passed, this section would alert proponents and opponents alike of those projects for which some form of negotiation is expected by the locality.

2. *Establishment of a recognized network of neighborhood groups.* The network may improve communication between project applicants, local government and the public, and minimize concerns about power and legitimacy associated with ad hoc groups. The town role could include approval of organizations' bylaws to ensure adequate representation, with the following elements required: (a) notification to all potential members about the organization's existence and purpose, (b) a periodic process for the democratic selection of leaders, (c) explicit solicitation of input to, and notification of, all public stances of the organization together with notification of all communications received by the organization.

The town could appoint a staff member as liaison to the neighborhood groups, with responsibility for providing them with information.

3. *Early communication with neighborhoods for projects listed under the "Interests of Particular Concern".* The quid pro quo for listing as an "interest"—which tends to enhance the project's legitimacy—requires communication between the applicant and affected parties prior to site selection or detailed planning. This enables the full spectrum of community interests to be raised. The procedure could be as limited as notification through the media or mass mailings inviting comment. On a higher plane, notification could be followed by a public meeting to gather further input. If a network of neighborhood groups is established, a first round of negotiations could be conducted. Negotiations, mediated by the planner if requested, could identify interests, determine possible site selection and review criteria and inform participants of the development review process. Thoughtful planning and careful attention to the development of precise, unambiguous objective criteria by which potential sites will be evaluated at this step can set the stage for a successful principled negotiation.

balancing interests

4. *Appointment of a task force to provide advice during the site selection process.* The task force could be a standing committee which convenes for any major project siting or a committee whose membership is appointed on a project-by-project basis. Its role would largely be determined by the applicant, who would not be required to use task force services. It is unlikely that the applicant would wish to appear uncooperative because of the local government's development review role. The task force would act as a surrogate for neighborhood interests during site selection. Operating in an advisory role, the task force would ensure that site-specific concerns are communicated to the applicant, while safeguarding the confidentiality of the applicant's actions. The long-term success of the task force would depend on its ability to uphold confidentiality. Task force suggestions, like those of the planner/mediator, would not imply town sanction of any outcome.

5. *Neighborhood involvement in preliminary site design and development of mitigation measures.* Analagous to the development of conditions often accompanying the issuance of a special permit, this step could involve substantial negotiations. At this point, the most affected neighborhood may oppose the project and may propose alternatives that can

group network

then be evaluated by the previously determined criteria. Eventually, opponents will face the decision to provide input to minimize adverse impacts while opposing the project during the review process, or opposing the project without providing input. Although opponents may argue that its concerns were not fully mitigated, it cannot charge that it was denied involvement in the process. The local government could thus judge the project on its merits.

advisory capacity

6. *A written, public analysis/comment/response procedure for all projects listed as "interests of particular concern."* This final procedure, occuring during the development review process, ensures that all concerns are raised, and responded to, prior to the final decision on the project application. It would include the Planning Department's written analysis and recommendation for the project, available to the public prior to the public hearing. The public would have the opportunity to submit oral and written comments on the project at the public hearing. The Department would then supply written responses for each comment to the town council and public prior to the council's decision.

sense of participation

Conclusion

The enhanced participation/negotiation process described increases public input relative to the traditional development review process. Where lawsuits or other delays are avoided, the recommended process could also save participants time and money and improve community relations. The negotiation process would take longer and cost more than the traditional process if both ran smoothly. Bargaining would tend to focus discussion on legitimate criteria and establish more useful precedents by minimizing conflict over process issues. By expanding the debate, negotiation would arguably increase the probability that the solution most in the public interest will be selected. □

NOTES

1. Lawrence Susskind, *The Siting Puzzle: Balancing Economic and Environmental Gain & Losses*, Harvard Program on Negotiation Working Paper Series 85-5, January 1985.
2. Roger Fisher, and William Ury, *Getting to Yes: Negotiating Agreement Without Giving In* (New York, NY: Penguin Books, 1983).
3. Susskind p. 12.
4. Howard Raiffa, *The Art and Science of Negotiation* (Cambridge, MA: Harvard University Press, 1982).
5. Timothy Sullivan, Resolving Development Disputes Through Negotiation (New York, NY: Plenum Press, 1984).
6. Working as a mediator, advocate or information broker requires the planner to communicate effectively and to act to correct the distorted communication of other parties. Jurgen Habermas' work on communicative competence for planners has been interpreted by several planning authors; see John Forester," Planning In the Face of Power," Journal of the American Planning Association, Issue 48 p. 67-80, Winter 1982 and Harvey Goldstein, "Planning As Argumentation," Environment and Planning 13, 1984, vol. 11 p. 1-16.
7. Frank Popper recommends that "Local land use regulations... have sections devoted to the LULU, showing where specific kinds might not be located and explaining why." He suggests this will help planners deal with the five types of arguments used to oppose LULU's. These arguments against LULU's include that they are: not needed, do not belong in a particular region, are sited in the wrong place, had poor siting procedures, and will have harmful effects. See Frank Popper, "The Environment and the LULU," Environment Vol. 27, No. 2, p. 40.

Profile of a Successful Negotiation: The Crest Street Experience

Laura D. Bachle Laura Hill Tim Nifong

How do you define "success" in a negotiated settlement? The following case study defines it as "Crest St"—a low income neighborhood moved out of the way of a highway in Durham, North Carolina. Although the parties didn't immediately concur with this appelation, their smiles belie their sense of pride in the outcome.

The Crest Street area in Durham, North Carolina, is an established, low-income, black neighborhood typical of many found in southern cities. It is intergenerational, with relatives exchanging greetings daily, small truck gardens, and the kind of house style that lends itself to porch-sitting. Nonetheless, an outsider merely passing through may not give it a second thought. But a strong sense of community makes Crest Street very important to many people.

In 1981, Crest Street had the look of a neighborhood low on the list of the city's agenda. The streets were in disrepair and houses had been run-down and abandoned. Indeed, the city had something different in store for the area—an expressway. There was an urgent demand for highway expansion, and Crest Street was slated for destruction.

A year later, on December 15, 1982, the City of Durham, the North Carolina Department of Transportation (NCDOT) and the Crest Street Community Council agreed on a mitigation plan that would relocate the entire neighborhood. Since 1959, the NCDOT had planned to extend the Durham East–West Expressway to U.S. 15-501. The proposed route travels just north of Duke University and the Veteran's Administration Hospital. This article documents the success of the relocation project by detailing the negotiation process.

The article is divided into four parts. Part I presents the prenegotiation phase, addressing the issues, objectives, and institutional constraints faced by each of the stakeholders. Part II, the negotiation phase, discusses the techniques used, stages of the process, alternatives generated, and the resulting settlement. Post settlement is discussed in Part III, presenting the implementation and monitoring of the program, while Part IV presents an analysis of the negotiation process based on some evaluatory criteria.

I. The Pre-negotiation Phase.

The major participants in the negotiation included the City of Durham (City), the Crest Street Community Council (Council), the North Carolina Department of Transportation (NCDOT), Duke University (Duke), and the Federal Highway Administration (FHWA). Outside groups also active at various stages of the negotiations included Durham County, the Durham Committee on the Affairs of Black People, the People's Alliance, and the Durham Voter's Alliance.

After the project's proposal in 1959, the City and the Department of Housing and Urban Development (HUD) showed reluctance in granting funds until a decision was made on the Expressway. Consequently, this placed the City of Durham in an

The authors wish to thank Richard Smith and Louis Allen with the North Carolina Department of Transportation; Dick Hales and Linda Del Castillo with the City of Durham; and Willie Patterson and Mike Calhoun with the Crest St. Community Council.

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A typical Crest Street residence prior to 1984.

awkward position. They lacked the necessary resources to provide assistance to the Crest Street residents for improvements, and they saw the need for an Expressway to alleviate traffic circulation problems within the City. The City's support for the proposed expressway was, as proposed, in conflict with the neighborhood's desire to remain a cohesive community with adequate living conditions. Minor street improvements (approximately $50,000 worth) were finally approved a few years prior to the relocation of the neighborhood.

early opposition

Opposition to the "Crest Street" portion of the Expressway began as early as 1972, when a suit was brought to enjoin construction based on violations of the North Carolina Equal Protection Act. In 1973, District Court granted a preliminary injunction. These legal activities took place prior to the formation of the Crest Street Community Council in 1975.

The First Attempt.

participation plans

In 1978, the City Council directed the staff to prepare a relocation plan for the Crest Street neighborhood. General data on the neighborhood was collected and a Citizen Participation Plan devised to involve citizens in the rehousing plan. The plan was never implemented. In retrospect, participants feel that the failure to implement the Citizen Participation Plan was mainly due to the plan's emphasis on broad representation. As meetings between the parties progressed, it was found that a limited perspective provided by a few citizens who had already gained respect and support from the neighborhood could best serve the community's interest.

Around the same time as the failed Citizen's Participation Plan, the Crest Street Community Council filed an Administrative Complaint with the United States Department of Transportation. The complaint proposed that routing of the expressway by the North Carolina Department of Transportation was an act of racial discrimination against the neighborhood. Very soon thereafter all work ceased when the City Council voted against the Expressway. But after the elections, the new City Council reinstated the plan, made it a top priority, and began to exert pressure on the NCDOT and Governor's Office for assistance in the relocation of the Crest Street Community.

In 1980, the USDOT advised the State that construction of the expressway would violate the Civil Rights Act of 1964, thus validating the Administrative Complaint. After debating for ten years, all stakeholders began to push for a negotiated settlement. Time, attitude, and resources were the major factors in pushing all parties to begin to negotiate an agreement.

II. The Negotiation Phases.

There were essentially two phases to the negotiation process. After the USDOT informed the State that the administrative complaint was valid, the City, FHWA, and the NCDOT met to come up with a plan of action. A Steering Committee was formed, comprised of top officials from each interested party: the NCDOT, FHWA, City, County, the Crest Street Community Council, Durham Committee on the Affairs of Black People, Duke University and the People's Alliance. The formation of the committee occured on April of 1980, with the first meeting in June of that year.

The Steering Committee was essentially the first phase of the negotiation process. One of their primary undertakings was to appoint a task force to study the neighborhood. Task force members, as opposed to Steering Committee members, were not

elected officials or particularly visible representatives for their respective agencies. As mid-level administrators and technicians, the first assignment of the task force was to coordinate a survey of Crest Street residents so that opinions on various issues could be compiled. Besides appointment of the task force, the Steering Committee reviewed five alternative routings of the freeway generated by the NCDOT.

One can surmise from the minutes and opinions expressed during this time that positional bargaining, posturing, and bad faith negotiations were the rule, rather than the exception during this first phase of negotiations. Power relationships were established at the expense of a negotiated settelement. The steering committee was unable to move beyond their political posturing, and the first phase ended when the City Council rezoned some property adjacent to the neighborhood from "residential" to "commercial" on November 10, 1980. The neighborhood notified the Department of Highways that they were reassessing their role in the Steering Committee and would not participate in a task force meeting scheduled for November 24th.

At this point, a ten month impasse began during which a series of separate meetings were held between the NCDOT and the other parties. The NCDOT reassessed their role in the negotiations and identified alternative courses of action in January of 1981. Essentially, they had three: (1) drop the project—a politically and economically costly alternative; (2) push the project through and run the risk of losing good relations with all parties, including the FHWA, and eventually going to court over the project; or (3) negotiate a settlement. Of the three alternatives, the latter was the most desireable.

Between January and October of 1981, each of the major parties to the conflict met separately with the NCDOT. Basically, the NCDOT's aim was to get the neighborhood and the City to resolve their differences. On October 15, a full meeting of the task force took place, signaling a new phase of the negotiations. Although the same parties representing the same interests were there, members of the politically visible Steering Committee no longer participated.

Power Relationships.

When the task force reconvened, the relationship between the members were significantly different. Most of this change can be attributed to the legitimacy the neighborhood gained by virtue of the preliminarily successful Administrative Complaint filed with the USDOT, and of the 1980 Steering Committee walk-out in protest of city actions.

Significant in this new round of meetings was the relative lack of any power struggles between the parties. The task force saw the Expressway extension as a problem to be solved by team effort. Consequently, it was at this point that the personalities of the task force members really aided in negotiating a settlement. As one interviewee put it, "the chemistry was just right for a settlement." The staff from the City and the NCDOT ended up working closely together to solve the problem. The Council clarified that they were only opposed to the effects of the freeway extension, and not to the freeway itself. This made it possible for genuine progress to commence. The FHWA played a vital role on these sessions by interpreting the laws governing NCDOT conduct broadly so that solutions could be generated.

the right chemistry

Second phase negotiations took place from October of 1981 to December of 1982. Meetings were held two to three times a month. The negotiators themselves had severe time constraints that gave the proceedings a sense of urgency—a factor that aided the settlement.

sense of urgency

During the course of the second phase of the negotiations, an approximate three year time table was imposed on the agreement. This greatly aided all the parties in ensuring prompt and timely compliance with settlement provisions.

In the beginning of the negotiations, the NCDOT suffered from a poor image in the eyes of the Crest Street Community Council, and not without reason, based on the precedent set when the Expressway displaced a similar community in the late 1960's. This bias had to be resolved before the negotiations could continue successfully. However, as a result of the meetings between the Council and the NCDOT, the Council's attitude toward the NCDOT changed, and the neighborhood realized the NCDOT was willing to work with them.

Strategies and Alternatives Generated.

Despite the willingness of the parties to work together during this second phase of negotiations, their sense of urgency, and their respect for the concerns of each actor, the mitigation plan and the negotiated settlement would never have been signed if some key events had not occurred. Primary among these was the state legislation approval of

key events

last resort housing funds for public agencies (N.C. General Statute §. 133-10.1). The funds, approved in 1980, had been used before, but the NCDOT administration had not made a habit of using them. The flexibility shown by the NCDOT and FHWA negotiators made it possible for those funds to be used. If other parties had been involved, it is quite possible that those funds may have never been utilized, and consequently, no settlement reached.

new design ideas

Another significant event concerned the amount of land needed to build the interchange. This became a major problem in resolving the dispute. About the time the negotiations were underway, a new interchange concept, called the "urban diamond" was being tested in Florida. It's attractiveness was due to its conservative use of land as compared to contemporary interchange designs, allowing the interchange to be "squeezed" onto significantly less acreage. Subsequently, this design was incorporated into the Crest Street plan.

The NCDOT, because it was able to use last resort housing funds, waived the usual requirement that the City acquire a share of the right-of-way for a major state roadway within it's bounds. This waiver freed money for rehabilitation and relocation, and encouraged cost-sharing efforts between the City and the NCDOT. This decision by NCDOT was a significant break through in the negotiations. Previously, the City had a "bottom line" for monies to be used for Crest Street Neighborhood improvements, which was not barely enough to complete the needed rehabilitation for the neighborhood.

A litany of route alternatives were produced throughout both phases of the negotiation process. All but one was introduced by the NCDOT. By December 1981, three alternatives had been tentatively selected. At this point, the neighborhood demanded that a mitigation plan accompany each alternative. The mitigation plans were formulated and eventually a revised version of the best alternative was adopted by the parties. In general, each alternative route and respective mitigation plan was reviewed, then relative strengths and weaknesses were discussed to arrive at the selected agreement.

Before . . . an abandoned school.

Outcome Settlement.

The mitigation plan signed by the Durham City Council, the NCDOT and the Crest Street Community Council contains the mitigation efforts proposed by the above parties, and input from the FHWA. Funds used for the relocation project included general revenue bonds, Section 8 New Construction, Section 202, Section 8 Moderate Rehabilitation, and Community Development Block Grants. In one area, the NCDOT paid all costs within the Expressway corridor, with area activities cost shared between the State DOT (⅔ of the costs) and the City (⅓ of the costs). Commercial redevelopment is proposed for part of the City's land, with costs paid by the City and proceeds from sales shared by NCDOT and the City of Durham.

Construction and rehabilitation of dwelling units consists of the following:

- 65 houses rehabilitated (moved)
- 21 units in Hicks Elementary School rehabilitated (moved)
- 8 condominiums rehabilitated in place
- 12 new single family homes
- 45 Crestview Apartments
- 4 houses rehabilitated in place.

Recreation facilities include a park, baseball field, and a community center. The NCDOT is responsible

for construction of a noise abatement wall and landscaping along the right-of-way.

In order to accomplish the relocation project, the City and NCDOT agreed to offer relocation assistance benefits (which includes last resort housing benefits) for all displaced Crest Street residents. Relocatees had basically three options under the last resort housing provision: (1) to remain owner-occupants and purchase a replacement dwelling with relocation assistance based on rehabilitation costs, mortgage costs, cost of property acquisition, and fair market value of the existing lot; (2) to remain as tenants eligible for rental assistance payments, through state funding (last resort housing) and/or federal assistance (Section 202 federal loans); or (3) to convert from tenant to home-owner through deferred mortgage loans provided by the City.

Both the City and the NCDOT agreed to assist the community with grant and subsidy applications. Today, the relocation assistance has resulted in an increase in home ownership from 15% to almost 90% of the Crest Street residents.

A second plan, the Crest Street Community Redevelopment Plan, completed by the city on March 31, 1983, provides a more detailed description of the overall agreement, indicating project costs, project proposals, and steps for implementation.

III. Post Settlement Phase.

Task Force meetings continued once a week for almost two years. Presently, meetings are held once a month at City Hall. The parties now attending the negotiations include one neighborhood representative, and two representatives from both the City and the NCDOT. Sometimes an auditor or other interested party attends. All problems and progress reports are discussed at the meeting.

Presently, the relocation of residents is complete. Most relocatees have chosen to own their own home as opposed to renting it, and also have chosen renovation over newly built homes. City costs have exceeded earlier estimates, and are up to $4.9 million as a result of neighborhood preferences and ill-advised land appraisals.

The relocation site continues to be under enormous growth pressure. A portion of the potential relocation land was sold during the negotiation process to establish a racquet ball club. Currently, the VA Hospital located directly south of the relocation site wants to lease some property to build a five level parking deck. It is also anticipated that this property will appreciate considerably as a result of the East-West Expressway.

After. . . a new senior center.

Post Settlement-Settlement.

The NCDOT placed a renovated house/office near the site to facilitate relocation. They maintained a staff that worked closely with the City in improving the site and coordinating financing for the residents. They also coordinated all construction and moving of structures. The City and the NCDOT have a maintenance agreement for landscaping, site improvements, and infrastructure.

Few changes have been made to the original Redevelopment Plan and Municipal Agreement. Largely due to the combined efforts of all parties in preventing further amendments and hence further complications to the project, those changes that have been made have been relatively minor. For instance, due to the number of people who wish to own their own home rather than to rent, the apartments planned were changed into condominiuns.

important factors

Evaluation

Jim Arthur, as a mediator for the New England Mediation Institute, has had extensive experience in dealing with parties to development disputes and in working with those parties to bring about a mutually acceptable resolution. At a recent session as a guest lecturer at the U.N.C. School of Law, he was asked to identify factors he felt to be essential to successful negotiation. He identified six factors: (1) agreement on the essential parties involved in the dispute; (2) agreement on what the critical issues at hand are; (3) a balance of power between the essential parties involved in the negotiations; (4) a sense of urgency to settle among the parties; (5) flexibility as to an acceptable settlement; and (6) uncertainty regarding the ultimate correctness of the course of action being pursued by each party.

essential parties

These criteria are similar to factors identified by others in the field of mediation. As a tool for evaluating negotiation success, criteria can identify factors that aid and hinder negotiations. This provides a means of learning how to improve the negotiation process.

Agreement of Essential Parties.

The old adage "too many cooks spoil the broth" is as applicable to negotiated settlement as it is to the culinary arts. If too many parties are involved in an attempt to resolve a dispute, negotiations may become so complex that final settlement is impossible. Furthermore, successful implementation of a negotiated settlement is only possible if all parties critical to the settlement are involved in the negotiation process.

Resolution of the Crest Street dispute involved paring down the number of parties from those merely interested to those essential to implementation of the agreement. During the two years in which negotiations took place, no fewer than nine separate groups were, at various times, offered the opportunity to participate in the negotiations. However, all parties eventually realized that no more than five of these groups were vital to the success of the negotiated outcome. Therefore, the task force who forged the final mitigation plan were: (1) the City, whose municipal limits included both the Crest Street Neighborhood and the proposed Expressway segment; (2) the NCDOT, which served as project overseer and final authority over the proposed freeway; (3) the Council, whose members represented the neighborhood to be displaced; (4) Duke University, which was a major landowner of properties adjoining the neighborhood relocation area; and (5) the FHWA, a sort of de facto mediator early on in the process, which represented the substantial federal interests (both legal and monetary) in the dispute resolution. It was soon evident that only three parties—the City, the Council, and the NCDOT—were essential to the resolution and implementation of the final mitigation plan. Only these parties signed the final agreement.

crucial considerations

Critical Issues.

Just as it is important to include all parties pertinent to the final agreement, it is also critical that the negotiators are in accord about the issues at hand. The inherent nature of the Crest Street conflict dictated clarity. Can a state route a much needed highway through a poor, close-knit community, when no viable alternative exists? This was the issue recognized by all three parties. But even though this was recognized early by all the major parties involved, the interests held by each major participant biased perceptions and coloured interpretations of the major issue.

On the one hand, the City in 1979 received what was essentially a mandate from the electorate that the East-West Expressway was to be completed at any social or economic cost. This was a major plank in the platform of the mayor and many of the council members elected at the time. The Crest Street Community, meanwhile, had watched the physical condition of the neighborhood deteriorate steadily over the years. City aid and reparation services diminished, due presumably to the belief that the neighborhood was "on its way out." On the other hand, the routing was subject to the constraints of relatively intense commercial, industrial, and institutional development in West Durham, so the NCDOT had little real political or economic choice in proposing the freeway corridor as it did.

It was only when the individual interests of each major party to the dispute were recognized by the other principals as legitimate that the parties were able to view the major issues in the same light, placing the negotiations in a perspective capable of rendering them at least potentially successful. This ability to "see the other side" was brought on by two factors. (1) the attainment of power and legitimacy by the essential parties, and (2) moving the negotia-

Neighborhood residents and NCDOT officials at a house closing.

tions from the politically visible steering committee to the less visible task force. A balance of power, critical to issue recognition and good faith effort, existed.

Balance of Power.

Both in the context of focusing attention on the critical issues involved in a dispute, and of guaranteeing that each party's interests are considered fairly, the balance of power among parties attempting to negotiate a dispute settlement is essential. Given the very political nature of the setting surrounding the Crest Street neighborhood conflict, it is probable that there would have been no negotiated settlement had each major actor in the dispute not posessed legitimacy. And with legitimacy came the power represented by status substantially equal to that of the other parties involved.

Each party derived its power somewhat differently. The State of North Carolina, as represented by the DOT here, possessed a number of powers. One was its legal authority as the instrument of the State, wherein it could utilize eminent domain. With this power it could move pretty much whomever and whatever it needed, while compensating those moved fairly, in order to secure right-of-way for a public thoroughfare. Further, the NCDOT posessed the "power of the purse." As such, within its statutory authority, it was able to finance the Expressway by whatever means were suitable and necessary. Indeed, it was this very power relative to legislative authorization for last resort housing payments in 1981 (N.C. General Statutes 133-10.1) which was viewed by all parties as a major turning point in negotiations. Yet, the State's powers were not limitless, as a 1980 advisory memo from the USDOT Director of Civil Rights advising the State DOT pointed out.

The City's power was also multi-dimensional. With its zoning power the City was able to tighten- or loosen – the noose around the neck of the neighborhood. Of even greater importance was the derivative power of the City conferred upon by the voters, who clearly stated their desire that the freeway be quickly completed in the 1979 city elections. Nevertheless, like the powers of the other state arm – the NCDOT – both of these powers are legally constrained (zoning designations, for example, cannot be arbitrary) and politically constrained (as

city power

when the Council withdrew from the negotiations in November of 1980 when the Durham City Council was perceived as acting in bad faith in rezoning a residential neighborhood parcel as commercial).

The ultimate power of the Council was largely de facto, deriving from two incidents alluded to above. The Council's September 1978 filing of an Administrative Complaint with the USDOT alleging racial discrimination, and subsequent preliminary agreement on the matter by the USDOT, established the Council as a power to be reckoned with. Absent some intervening event, at the very least the State was subjecting itself to the burden and expense of future litigation; at the most, the Council had the potential ability to preclude the disputed expressway segment altogether. In the negotiations that ensued after this event, Council's act of terminating negotiations when the City acted in bad faith in the rezoning incident made it clear that Council had no intentions of "lying down and playing dead," but would have to be dealt with as an equal. But as with the other parties, the Council's powers were not absolute – the act of walking out of the negotiations could well have resulted in the final breakdown of negotiations, with no guarantee that the verdict of the racial discrimination complaint would be in their favor.

specific interests

The effect of the substantial, but not unrestricted, powers possessed by each party to the negotiations was to create a climate wherein each side was likely to give due consideration to the views and interests of other parties, in order to have that courtesy reciprocated. Moreover, the balance of power existing – where no clear winner was likely to emerge via any non-negotiated settlement route – greatly increased the likelihood and desirability of a negotiated settlement on the Crest Street case.

A Sense of Urgency.

much uncertainty

The sense of urgency for a relatively quick settlement placed upon each of the parties by the chronology of events that took place before and during the negotiations aided the agreement. In the City's case, the electorate had made it clear that it wanted the Expressway finished quickly. Traffic congestion in West Durham was worsening, and continuation of an unresolved situation created a political liability for the City Administration. All of these facts and events helped to spur the parties toward a negotiated settlement, but there was a single factor which, in the end, was one of the most important catalysts for the February 1982 final settlement. When the negotiations began, the City of Durham had already been allocated HUD monies to rehabilitate as many as 75 low-income rental units plus 20-year rent subsidies for those units. Durham had already considered and rejected a number of locations for these units, and unless they (or some portion of them) were placed by March of 1982, the allocation was to be withdrawn by HUD. So when the chance to utilize those allocated monies presented itself in the Crest Street case, the parties seized the opportunity and carried on marathon negotiation sessions in order to beat the HUD-imposed deadline for use of the subsidized housing funds.

With respect to the NCDOT, the Department had already invested tremendous sums of time and money in planning and in overseeing completion of approximately 60% of the East-West Expressway. Consequently, it could hardly back away from the proposed "Crest Street" freeway segment. And every delay in the construction schedule pushed up the final cost of the project a little more.

For its part, the Council knew that no improvements were going to be made to its neighborhood by the City until and unless the Expressway problem was resolved. Further, the Council feared to be out of step with the conservative national trend then occurring relative to the dispute. The USDOT officials, who had advised the NCDOT that its proposed plan for the Expressway probably violated the civil rights of the Crest Street Community citizens, had served under President Carter. By 1981, new officials were in place that might have reversed the advisory opinion on the Administrative Complaint filed by the Council. Thus, the Council, as well as the City of Durham and the State DOT, felt pressured by factors beyond their control to act in resolving the Crest Street conflict as quickly as was judiciously possible.

Uncertainty.

Sometimes, when a party involved in a conflict maintains an almost irrational belief in its course of action as "the only right course," a negotiated settlement becomes impossible. But where some uncertainty exists as to the correctness of the chosen course being pursued by any individual party, that lack of assuredness can be seized upon by the negotiation process to bring the parties toward some more central, mutually agreeable compromise. Lack of certainty in this context means only that a party is unsure as to the most correct course to achieve

its objectives, and not that the party lacks conviction as to those objectives.

In the Crest Street negotiations, each party had specific interests in mind, but uncertainty existed as to how to best realize those interests. The City, for example, clearly wanted the East-West Expressway completed for economic and political reasons. But the City was unsure as to whether it was essential to displace the Crest Street neighborhood in the first place, and if so, how to mitigate such massive community disruption. For the NCDOT as well, there were political risks and associated costs related to the conflict which resulted in uncertainty. NCDOT was used to getting things done, and from an investment standpoint needed to finish the proposed Expressway segment as quickly as possible. Yet, while they were more insulated from the repercussions of displacing the Crest Street Community than the City, the State Administration in power at the time had a very real interest in minimizing the social and political impact of displacement. The subsequent dilemma for NCDOT—whether to push forward as planned, or put things on hold until a viable alternative proposal could be derived—was fraught with uncertainty as to: (1) how much time and money to spend developing new alternative designs for the freeway in order to mitigate its social impacts, (2) the role the State should play in relocation of displaced residents (both administratively and financially), and (3) its role in relation to the desires and authority of the City in the dispute.

The Council wanted both to maintain the integrity of the Crest Street Community and to improve the quality of life for its residents. But even with what appeared to be a strong case of racial discrimination against the State, the Council was unsure whether stopping the freeway altogether was the proper path to pursue. After all, Durham did need the Expressway to improve traffic flow and relieve congestion in the western portions of the City (including the Crest Street area), no truly viable alternative route for the freeway existed, and putting a halt to Expressway construction in no way assured the neighborhood of any improvements.

The net result was that the inherent uncertainty among the major actors in the Crest Street dispute contributed to a climate conducive to a successful resolution of the conflict. The final mitigation agreement replaced the uncertainty experienced by each side with assurances safeguarding the best interests of all major parties in the Crest Street conflict.

Celebrating a new Crest Street.

Flexibility.

It is self-evident that settlement of a dispute is enhanced where flexibility as to the resolution of pivotal issues exists, since this allows a whole range of potential outcomes from which a mutually acceptable choice may be selected. In the Crest Street case it would be fair to say that by the time negotiations began, all essential parties believed in the reality, if not the necessity, of both constructing the Crest Street segment of the East-West Expressway and the relocating of the Crest Street neighborhood as a community. And as the case history discussion makes clear, a number of alternative ways existed wherein these priorities might be accomplished. That alternative chosen was the plan that proved to be the most acceptable to the respective constituencies represented by each of the negotiators. This was a way of using flexibility in a non-threatening manner.

Conclusion

The essentially successful nature of the Crest Street negotiation can be summed up in one statistic. Before the relocation, 15% of the residents were owners. After the relocation, 94% of the residents were owners. On May 3, 1986, all of the parties met to celebrate their success at the New Bethel Baptist Church. Joy and satisfaction emanated from every face. The most telling hallmark of a successful negotiation—lasting goodwill on the part of all parties—was displayed by the entire neighborhood. □

When and How to Negotiate

Denise Madigan Gerard McMahon Stephanie Rolley Lawrence Susskind

The National Institute for Dispute Resolution, in conjunction with the Harvard Program on Negotiation, has produced a manual entitled: New Approaches to Resolving Local Development Disputes. In addition to "when and how", the manual uses six cases to illustrate recent efforts at mediated negotiation, outlines a step-by-step guide to using mediated negotiation, and lists sources of support for use of the technique.

Denise Madigan, Gerard McMahon and Stephanie Rolley are research associates with the Public Disputes Program of the Program on Negotiation at Harvard Law School. Lawrence Susskind is director of the Program and a professor of planning at MIT.

"Mediated Negotiation" is a term used to describe the role of a mediator in public disputes. A "mediated negotiator" is someone who is concerned with the traditional elements of mediation such as fairness and process, as well as with the quality of the outcome. This term readily applies to planners. In the following excerpt from the National Institute for Dispute Resolution, some valuable pointers are given about how to identify a case ripe for a mediated settlement, how to handle the negotiation, and how to evaluate the outcome.

When To Try Mediated Negotiation

Not all local public disputes are amenable to or appropriate for negotiation. In some cases, a concerned party or decision-maker will want to use traditional administrative, legislative, or judicial processes to make controversial decisions or handle complex disputes. And even when these processes may seem less than perfect, mediated negotiation is not always the best alternative.

Experience over the last ten years suggests that there are certain characteristics of disputes which make them more or less appropriate for mediated negotiation.

Questions To Ask Before Negotiating

There are several questions which should be asked before launching a mediated negotiation to resolve a local public dispute.

"Are the likely parties to the dispute numerous diverse, and hard to identify? How much power do they have to block implementation of any potential agreement OR of any future activities that may have been planned?"

In situations where the parties are numerous diverse, and hard to identify, a mediated negotiation may be difficult to organize, but may also be the best way to address the concerns and secure the support of the involved parties. Typically such parties are frustrated by their lack of access to other decision-making or dispute resolution processes. They haven't the resources, clout, or expertise to gain entry to board rooms or court rooms, yet their cooperation and support may be essential to the success of a project or policy. By including these people in a mediated negotiation, all are more likely to understand each others' concerns, and to treat the decision or proposal as a JOINT problem requiring joint solving and support.

In addition, there may be parties whose cooperation is not critical to THIS particular project, but whose long run cooperation might be useful in a number of other projects. Including them in negotiations about which they care a great deal but over

This article is excerpted from a paper titled, *New Approaches to Resolving Local Development Disputes*, developed under grant from the National Institute for Dispute Resolution. The paper will be published by NIDR later in 1986.

which they have very little immediate influence may be wise: their support and good will may be secured for other projects in the future.

Are the parties willing to negotiate? Do they have incentives to negotiate?

There is much debate in the mediation literature about the appropriate "timing" of negotiations. Some people argue that mediation only works when a conflict is "ripe," that is, when the parties have squared off and are ready to do battle.

In contrast, mediation can work not only to respond to disputes that have erupted, but also to preempt disputes before they emerge. The decision about "when" to introduce mediation involves a tradeoff. In the early stages of conflict, the parties have not yet publicly committed themselves to positions; they are therefore freer to make concessions without losing face. But in the very early stages of conflict, the parties may not yet recognize or understand the relevant issues. They may also feel little immediate incentive to resolve their differences.

In the later stages of conflict, the parties may have incurred substantial costs (or losses) doing battle. As delays or lawyers' fees mount, the parties may be more interested in resolving their differences than they were months before. Thus, the incentives to negotiate may be greater later in a dispute. On the other hand, the parties may become more firmly rooted to their positions as time passes. If they have made their demands public, they may be very reluctant to relax those demands in the course of negotiations.

In the end, the mediator and the parties should be sensitive to the dynamics of the conflict. Mediation can work in the very early or very late stages of conflict, as long as (a) the parties have an *incentive* to negotiate, and (b) they *have not publicly locked themselves into positions.*

"Is there a controversial value judgment at the heart of the dispute? Are fundamental principles in opposition?"

In some cases, it may be appropriate for a judge or arbitrator to render a "verdict" in a dispute. Where fundamental notions of right and wrong are involved, and where people are reluctant to compromise these notions, mediated negotiation is unlikely to work. Imagine anti-abortionist and pro-choice proponents negotiating a settlement on federal abortion rights policy. It is highly improbable.

But in some cases, disputes are less concerned with ethical or moral judgements and more concerned with differences in preferences. Party A wants to open a shopping center and party B wants to eliminate traffic from the neighborhood. These disputes may end up being ill served by narrow legal determinations of right and wrong, especially since there may be ways to make all the parties BETTER OFF by taking a broader look at the dispute. (Perhaps Party B allows Party A to introduce a variety of shops in the shopping center, in return for an agreement changing two-way traffic to one-way traffic in the neighborhood. B gets more variety in his enterprises and A gets reduced traffic and the convenience of the center.) Mediated negotiation can enable the parties to look at ALL the issues in a dispute, and thus attempt to reach WIN-WIN solutions that take the broader issues into account.

ready to do battle

"Are the stakes great enough to justify the cost of a mediated negotiation?"

The scope of any dispute resolution process should be consistent with the scope of the issues involved. The techniques described in this handbook may be applied to a wide variety of situations. Associated costs will vary according to the techniques used and the scope of the issue. For example, you probably do not want to launch a 10-month negotiation effort with 50 parties just to resolve a dispute over a traffic light.

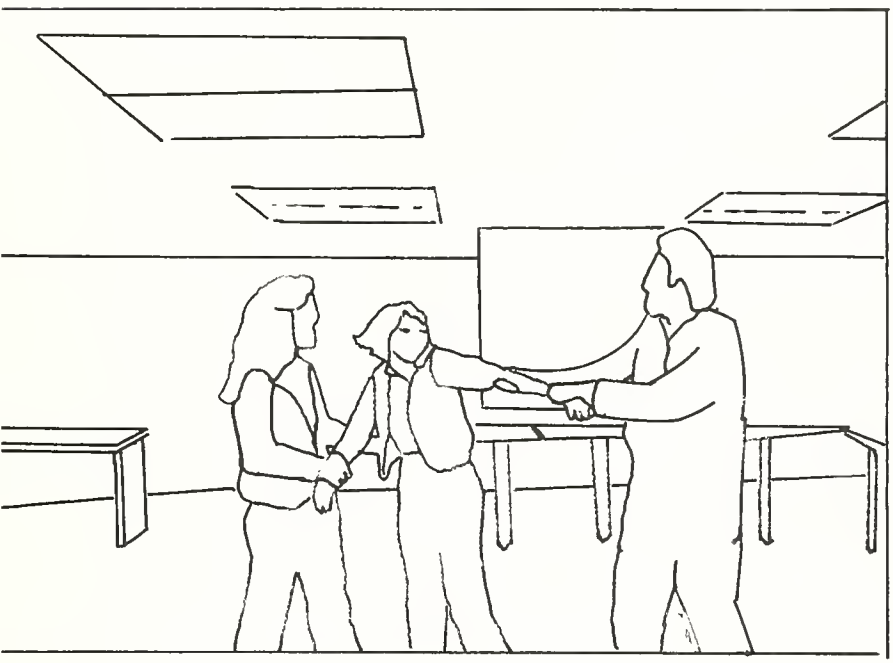
negotiation incentives

Discussions involving the installation of one traffic light should involve little cost and time. However, plans for citywide installation of a new traffic management system may warrant negotiations between the city, citizens, the business community and local developers.

"Does the general public care about the outcome of the dispute?"

In some cases, local disputes are purely "private" affairs. The general public is unlikely to worry about how two neighbors resolve their boundary disputes; the public doesn't care who "wins" the fight, and it won't care whether the neighbors ever speak to each other again. But there are a host of public disputes which affect a large segment of the community and which affect relationships within the community. In such cases the public is likely to care about the actual decision (or agreement) and the way that decision (or agreement) was reached.

Mediated negotiation is especially attractive for these kinds of disputes. Unlike public hearings or other public "advisory" processes, citizen representatives can shape the final decision in a mediated negotiation. And unlike litigation, mediated nego-



tiation encourages cooperation and communication, thus promoting better relationships in the community in the long run.

How To Negotiate Effectively

If you decide to participate in a mediated negotiation, you should spend some time thinking about your negotiation skills and strategies. Though we cannot, in a few pages, train you to be effective negotiators, we can suggest some questions for you to consider as you plan your negotiation strategy. Additional suggestions for effective negotiations are presented by Fisher and Ury in their bestseller *Getting to Yes.*

evaluating alternatives

"What are your INTERESTS? What is it you really care about most?" "What are the other parties' INTERESTS as well?"

Fisher and Ury, in *Getting to Yes,* describe the popular story of two children arguing over an orange. The children's mother enters the room, and witnessing the conflict, decides to resolve it in Solomon-like fashion: she simply cuts the orange in half.

The first child takes her half of the orange, peels it, and discards the peel, saving the fruit for orange juice. The second child takes her half of the orange, peels it, and discards the fruit, saving the peel for a cake she is baking.

Had the mother thought to ask the children what they wished the orange for, she would have understood each child's underlying interests. Each child initially stated she wanted the entire orange, when in fact she really only needed a part of the orange. A better solution would then have emerged: peel the orange and give the entire peel to one child and the entire fruit to the other.

This (admittedly overquoted) example illustrates how parties become deadlocked over positions when they fail to express or consider the interests behind those positions. In many disputes, there may be several ways to satisfy each party's concerns, not just those ways reflected in each party's opening statements.

As you enter a negotiation, try to identify what it is that you really care about in the negotiation. Try to distinguish your most important from your least important concerns. (You may find it useful to concede on the least important concerns in order to secure the more important ones.) Once you've done this for yourself, then try to do the same for the other parties. Try to imagine what their most and least important concerns are. If you can develop proposals to satisfy their most important concerns which cost you little, you will win their support and move the entire group towards a mutually beneficial agreement.

"What are your ALTERNATIVES to a negotiated agreement?" "What are the other parties' alternatives?"

In any negotiation, you should spend some time evaluating your alternatives to the negotiation. What is your best alternative if negotiations fail? Can you win your case in court? Can you persuade the key decision-makers on your own? Will you lose friends?

Your "best alternative to a negotiated agreement" (or BATNA as Fisher and Ury express it) can be a useful yardstick for evaluating proposals made by other parties. Should someone offer you a settlement less attractive than your best alternative, you should probably not settle. On the other hand, if someone makes a proposal that is better than your best alternative, you should think twice before rejecting it. Consider the negotiation an OPPORTUNITY to do better than your non-negotiation alternatives.

It also pays to think about the alternatives facing the other parties in the dispute. Unless you can make a proposal that beats their own BATNA's, you are

unlikely to secure their agreement. Moreover, the better their alternatives, the more effort you may have to make to accommodate them in a settlement.

"Can you work together to BRAINSTORM some creative OPTIONS without commiting yourself to these options?"

Negotiations are often most productive when the parties work together to "brainstorm" or invent options. According to the authors of *Making Meetings Work*, Michael Doyle and David Straus, unfettered brainstorming often leads to unusual and highly creative solutions to problems.

But the inventiveness of brainstorming sessions can be limited if the parties feel they will be bound by all the suggestions they make. People will hesitate to make creative, "off the top of the head" suggestions before they've had a chance to analyze each suggestion completely.

Consequently, a skilled facilitator or mediator will encourage the parties to invent options freely at different points during a negotiation, if only to stimulate creative thinking. Analysis of the options can then take place at a later point in the negotiations.

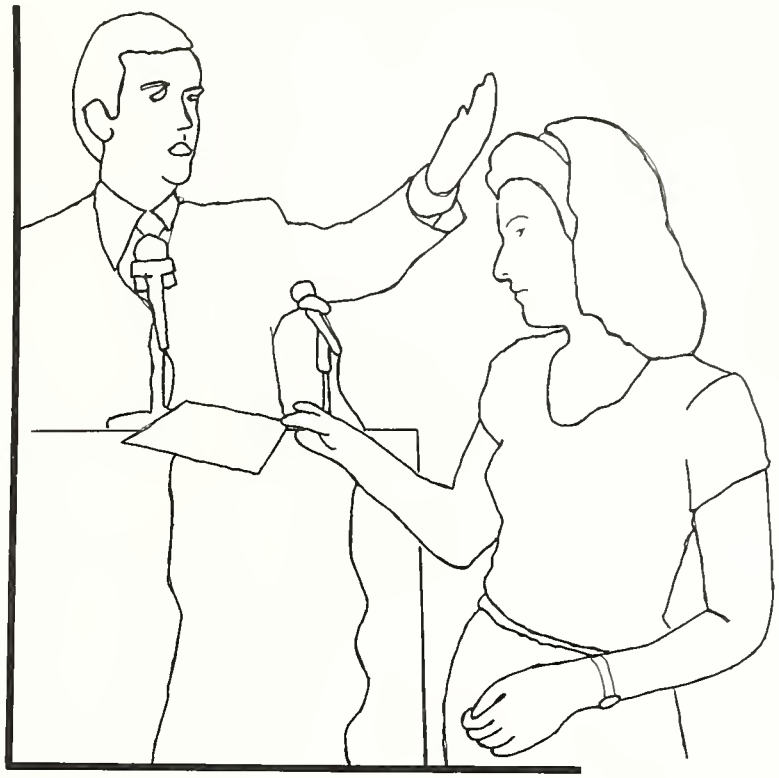
"How well are we COMMUNICATING with each other? How well are we LISTENING to each other?"

In the highly charged atmosphere of negotiations, it is often easy to misunderstand the other parties and to be misunderstood by them. If you do not understand what each other cares about, you will have an extremely difficult time framing proposals that are acceptable to each other.

It therefore makes sense to test, periodically, the accuracy of communications taking place in the negotiations. You can double check by asking the other parties to restate for you what you just said. You might do this in a non-offensive way by saying, "I think we may have misunderstood each other. What did you think I was saying?" Likewise, you might offer to restate their previous statements in order to doublecheck your listening skills. You can say, "I'm sorry, but I may have misunderstood you. Did you mean to say that. . .?"

"How stable or secure are the other parties' COMMITMENTS to the final agreement?"

It is often tempting to believe commitments are firm when a very attractive proposal is on the table. If you stand to benefit a great deal from a proposal, you may be reluctant to ask the other parties one last time, "Yes, but do you PROMISE to do such and such?"



Nevertheless, it is usually wise to *secure* everyone's else's commitments before you agree to sign the final proposal. If you can persuade the other parties to sign contracts, post bonds, or make public promises, terrific. But if you can only count on their word to secure their commitments, then take the time to study the commitments they have made. Make sure they have promised to do things they CAN, in fact, do. And try to make sure they have as little incentive as possible to renege on their agreement.

"What is happening to the RELATIONSHIPS between the parties in this negotiation?"

If you were haggling with a rug vendor in a Turkish bazaar while on vacation, you might not be concerned about the impact your negotiations were having on your relationship with the vendor. Odds are, after the vacation ends, you will never see that vendor again. In addition, it is probably unlikely that he will ever speak of you to someone else who knows you or does business with you.

But relationships in communities may be a much different story. In a public dispute in your own community, you may care a great deal about your reputation and relationships with the other parties.

Fisher and Ury urge negotiators to "separate the people from the problem." This is, in part, a purely practical issue. The other parties are unlikely to agree to anything if you spend all your energy

offending them. In addition, the issues at the heart of the dispute are probably complex enough to demand your full attention.

But there is another reason for separating the people from the problem. It protects you from parties who would try to exact concessions from you in return for their good will. If you are courteous, honest, and fair with each other, then good will should naturally emerge from the negotiations (or at the least, little damage should be done). Don't allow yourself to be blackmailed into giving in because someone threatens to cut off communications with you. Keep the discussions focused on your legitimate interests, and away from personalities.

courteous, honest, fair

In the end, regardless of how you may feel about the other parties, most of you will have a common goal. You will want to see the dispute resolved to everyone's satisfaction as soon as possible. And if relationships are improved in the process, so much the better. The negotiations will have generated both immediate and long run benefits.

"How will the agreement be viewed by the community at large? Will it be viewed as LEGITIMATE?"

Throughout this manual, we have been describing local PUBLIC disputes in which public officials are involved. These officials must worry about the public's perception of any agreement they accept, because they serve at the pleasure of the public.

perception of the agreement

Even if you are not a public official, you too should care about the public's perception of the agreement. If the public feels the final agreement is unfair and illegitimate, public representatives may actively try to undermine the agreement.

There are, of course, many ways to evaluate the fairness and legitimacy of the final agreement. It may help everyone to agree on some standards of fairness in the course of the negotiations, to ensure that the final agreement conforms to those standards of fairness. (Fisher and Ury describe this as establishing "objective criteria.")

In addition, the public is likely to be less critical of any agreement which is generated by an "open and fair" process. If all parties with a legitimate stake in the dispute have been allowed to participate in the negotiations, then the rest of the community may be hard pressed to criticize the final agreement.

How To Identify A Good Agreement

As mentioned above, there may be many ways to evaluate a good agreement. One way is based on the content of the agreement. Another is based on the process by which it was generated.

Roger Fisher and Larry Susskind, in their work at the Program on Negotiation at Harvard Law School, suggest there are several characteristics to look for in a "good agreement." Though these characteristics do not, by themselves, prove that a final agreement is good or appropriate, they do provide a starting point for evaluating the final agreement.

- *The agreement should be better than the alternatives to no agreement faced by the other parties to the agreement.* If it is not, then the parties who have "forgone" their better alternatives in order to secure the agreement should have done so voluntarily.
- It is not possible to make the agreement better without hurting another party. Negotiations should not be concluded if there is another, more elegant, agreement that will leave some even better off at no expense to anyone else.
- The agreement is feasible and stable. All necessary parties are committed to its implementation. Where performance of the agreement depends upon uncertain events in the future (e.g., elections or judicial rulings), then contingent agreements or renegotiation provisions are included in the agreement in order to prevent the entire agreement from unravelling.
- The process for reaching agreement did not harm relationships between people who will have to live or work together in the future. Relationships should improve as a result of the negotiations, not deteriorate.
- All parties to the agreement are satisfied with the agreement. No one should feel "taken." In addition, the community at large should feel that the agreement is legitimate and that a good precedent has been set.
- The agreement should account for the latest scientific, technical and general knowledge related to the situation. The outcome should be as "wise" as possible.
- And finally, the agreement should be reached in a timely and cost-effective manner. The parties involved should feel that negotiations were the most efficient and least costly method available. □

Book Review

Successful Negotiating in Local Government

Edited by: Nancy A. Huelsberg and William F. Lincoln
Published by: International City Management Association, Practical Management Series (1985).

Reviewer:
Gail Fischman

Negotiation: It occurs every day in local government offices. Whether it is the city negotiating with a local interest group or a planner talking with the developer of the new downtown office center, negotiation has taken on a whole new meaning to local governments. Increasingly, complex government interests and the high cost of unresolved conflicts has made negotiation an essential skill which all local government administrators and managers must possess. Since federal funds are being withdrawn from city budgets, the private sector is playing a more important role in city development and finance. Administrators have to be prepared to negotiate with supervisors, staff, department heads, and elected officials, as well as with outside individuals and agencies. Managers deal daily with resource allocation questions, land use disputes, and social tensions, for example. Negotiation may take place outside the local jurisdiction – in state, regional, or federal arenas. Local government officials must be able to feel confident when dealing with their colleagues in both the public and private sectors.

Successful Negotiation in Local Government offers a selection of current essays on the subject of negotiation in the local government setting. It provides a compendium of the latest tools and techniques of negotiating, while also describing the psychology, dynamics, and current language of the negotiation process. The tools and techniques of negotiation are rapidly changing. Collective bargaining and late-night sessions around the bargaining table do not typify most of the negotiation which takes place now. Today's negotiation is a new field with a new vocabulary such as "negotiated investment strategy, facilitation, and med-arb." Local officials will have to integrate this myriad of tools and techniques into their daily routines.

This book was published by the International City Management Assocation (ICMA) in 1985 as part of its Practical Management Series. The series focuses on providing currently available information on issues which are important to local practitioners. In 1980 ICMA predicted that "in the future, the prime skill of management will be brokering and negotiation."

The book is divided into four sections: introduction, the basics, the psychology of negotiation, and application. The first article by Jeff Luke sets the tone for the rest of the book. Luke describes three arenas for negotiation: the intersectoral arena (public-private, public-public, and non-profit-public/private); the intergovernmental arena (contracting with other government agencies); and the neighborhood arena. . ."which is the setting for triangular partnerships and land use decisions."

The second section of the book focuses on the basic tools and techniques of negotiation. The first two articles provide an overview of the latest techniques and answer some of the most commonly

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asked questions about negotiations. They also provide insight into some of the right and wrong ways to approach the negotiation process. The other articles in this section go into more depth on individual tools. Two articles are concerned with negotiated investment strategy (NIS), which takes a comprehensive approach to the public decision-making process, and the final two sections deal with labor-management negotiation.

The third section of the book offers a unique perspective on the process of negotiation. This collection deals with the psychological, emotional, and interpersonal dynamics underlying the negotiation process. Power relationships are discussed by Roger Fisher who coauthored the book *Getting to Yes: Negotiating Without Giving In.* Decision analysis, which is a way of anticipating other people's responses based upon the options open to them, is the topic of another article in this section. The articles are interesting, and they are an important addition to the book's discussion of the matter-of-fact basics of the negotiation process.

Finally, the fourth section pulls everything together by presenting five articles which examine real cases involving both successful and unsuccessful negotiations. The articles discuss a wide array of tools and situations in which the local administrator may find himself. The generic tools, discussed in the earlier sections of the book, are now applied to actual dispute resolutions. The chapter includes a controversy over land annexation, a water allocation problem, a hypothetical case involving the siting of a landfill, the use of NIS in formulating long-range planning goals, and finally three cases involving land use issues.

Successful Negotiation in Local Government should be on the shelf of every local government administrator and manager. It is an important work which describes the essentials of good negotiations. The editors have gathered the expertise and experience of some of the most prominent people in the field and have produced a very readable book which includes over one hundred bibliographical sources. Local officials will need to have current tools and techniques at their disposal in order to deal with the increasing complexity of government at the local level. *Successful Negotiation* provides the up-to-date information on the negotiation process which local administrators and managers can utilize. □

Consultants Index

Commentary

Some Thoughts On Planners and the New Dispute Resolution

David R. Godschalk

Dispute resolution techniques have come a long way from the old ad hoc approaches derived from academic psychology experiments. The new methods deserve an important place in the planner's tool kit. In fact, planners trained in the new techniques often are better equipped to resolve development disputes than lawyers or outside mediators.

I am aware of the sometimes exaggerated claims for negotiated settlement as the latest social panacea. Dispute resolution is no silver bullet. Many development disputes can not, and should not, be settled by negotiation. Some disputes should be decided in the courts; cases where the public interest is trampled do not deserve a win/win compromise. But the judicious use of dispute resolution could work out a large number of the development conflicts that planners face every day. The results would be more effective, efficient, and beneficial to all sides.

I believe that planners have an edge over lawyers and outside mediators due to our understanding of the substance of development disputes, as opposed simply to the process of dispute resolution. Our training as problem solvers equips us to master the process side, while our knowledge of urban systems equips us to generate creative alternative solutions. With some grounding in the theory and methods of dispute resolution, planners can learn to become very effective at seeking to further the public interest through use of these new techniques.

While there are a number of specialized methods available, the two main types of conflict settlement approaches are negotiation and mediation. Negotiation techniques are those that involve the opposing parties directly. An example would be negotiation between a city planning director and a developer over the amount of off-site facility improvements that a proposed project should pay for. Mediation techniques are those that introduce a neutral third party between the opposing sides. An example would be Virginia's Local Government Commission, which is an outside agency called in to facilitate and manage negotiation over annexation disputes.

Most local development disputes involve direct negotiation between the parties. These are the bread and butter zoning, subdivision review, and project design issues that planners face continuously. They mostly deal with smaller scale disagreements where a planner trained in dispute resolution can make a major difference in both the quality of the built environment and in the efficiency of the development management process.

Occasionally a development dispute gets out of hand. The issues or the personalities become too volatile for effective negotiation. At this stage, an outside mediator can step into the situation and provide the

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neutral conflict management necessary to keep the talks from breaking down. Knowing when this stage has been reached, and where to go for outside help, are very important. Most planners, unless they are exceptionally skilled and can easily step out of their own jurisdictions in order to help other governments, will not play mediator roles.

To make more effective use of planners' innate negotiating capacity, we need to invest in basic professional development. Within the planning schools, courses in dispute resolution can offer a grounding in the new methods and theory. My experience in teaching such a course to graduate students in planning, law, public administration, and business has convinced me of this need. Workshops and short courses can carry this grounding to practicing planners.

We also need more documentation of the successes and failures of development dispute resolution cases. Because the field is relatively new, case studies such as those in this issue are extremely valuable, though scarce. Planners should be encouraged to write about their experiences for others to use.

Finally, we need to expand the number of dispute resolution centers, where research and mediation services are combined. Universities are good locations for such centers, though not the only possibilities. Given the development pace and controversy in the South, it is surprising and disappointing that so few dispute resolution institutions are located here. A concerted effort is needed to fill this gap. □

A Review of Key Books on Negotiation

Dispute resolution has come out of the psychology lab. During recent years, the field has made major advances in theory, methods, and applications to real planning situations. Much of this progress has been pushed along by work at the Harvard Program on Negotiation.

Howard Raiffa has provided a theoretical concept for assessing the effectiveness of negotiation in his identification of the "efficient frontier." For any negotiating situation, this frontier describes the combinations of settlement options that exhaust all possible gains for the parties involved. It spurs negotiators to stay at the table until they can find no further joint gains. Raiffa's book, *The Art and Science of Negotiation* (Harvard University Press, 1982), includes several planning examples along with others from international diplomacy, government, and business.

Roger Fisher and William Ury have advanced the basic methods of negotiation. Their deceptively simple paperback text, *Getting to Yes* (Penguin Books, 1983), lays out solid principles for effective bargaining. One of their key tenets concerns identifying the power balance represented by the parties' alternatives to a negotiated agreement, which is the costs and benefits of withdrawing from the negotiation and seeking satisfaction from an alternative source, such as the courts. For weaker parties, developing an acceptable alternative improves your power at the negotiating table.

Planning applications of the new dispute resolution approaches so far are mostly centered on environmental management issues. Even Sullivan's *Resolving Development Dispute Through Negotiations* (Plenum, 1984), contains disappointingly few cases related to urban development management issues. But this is changing as the planners involved in the field, such as Larry Susskind and others, begin to publish accounts of the settlements they have worked on. Several of the articles in this issue demonstrate the rich range of potential development cases.

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